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IN THE

Supreme Court of the United States

WESTLEY WEST, *et al.*,

Petitioners,

v.

NICK A. CONGEMI, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a constitutional "Hatch Act" or "Little Hatch Act" be enforced, without violating the First Amendment's rights of free speech and association, by the termination of covered civil service employees who, acting in their official capacities as representatives of a public employee association, communicate to a candidate for office the association's endorsement and support for that candidate?

PARTIES TO THE PROCEEDING BELOW

The Plaintiffs in the District Court include Westly West, Dennis Lynch, Robert Polito, Henry Jaume, Bruce Verrette and Police Association City of Kenner, I.U.P.A., AFL-CIO, Local 8195. All Plaintiffs were Appellants before the United States Court of Appeals for the Fifth Circuit. They are Petitioners here. The Defendants, Appellees, and Respondents included Nick A. Congemi, Chief of Police, City of Kenner, Louisiana (in his official capacity) and the City of Kenner, Louisiana.

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PETITION FOR WRIT OF CERTIORARI

Westly West, Dennis Lynch, Robert Polito, Henry Jaume, Bruce Verrette and Police Association City of Kenner, I.U.P.A., AFL-CIO, Local 8195, Plaintiffs in the District Court and the Appellants in the Court of Appeals, hereby petition for writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Westly West, et al. v. Congemi*, et al., Fifth Circuit No. 99-30258 (March 21, 2000).

OPINIONS BELOW

The Court of Appeals opinion is unpublished and is reproduced as Appendix A to this *certiorari* petition (hereafter "Pet. App."). (Pet. App. 1a).

The District Court's opinion on Summary Judgment was issued on November 23, 1998 and is reproduced as Appendix F. (Pet. App. 17a). The District Court's final order is unreported and is reproduced as Appendix G . (Pet. App. 38a).

JURISDICTIONAL STATEMENT

The Court of Appeal's Opinion and Judgment were entered on March 21, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). A Petition for a hearing *en banc* in the Court of Appeals for the Fifth Circuit was denied on May 15, 2000. (Pet. App. 40a).

STATUTES AND REGULATIONS INVOLVED

This case involves the construction of Louisiana Revised Statute § 33:2504. The statute is reproduced as Appendix I. (Pet. App. 42a). See also City of Kenner Rules on Political Activities and warning to classified Appendix K, (Pet.App. 61a)

STATEMENT OF THE CASE

The Police Association, City of Kenner, Local 8195, International Union of Police Associations, AFL-CIO (hereafter "PACK") is an association, or union, representing the working interests of Kenner's police officers. In 1998, the five individual petitioners in this case were Police Officers of the City of Kenner, Louisiana. Petitioners served as the Executive Board of PACK. They were covered by Louisiana's "Little Hatch Act". Petitioners Nick Congemi was the Kenner Police Chief.

Petitioners, PACK's President (West), Vice-President (Lynch), Secretary (Polito), Treasurer (Jaume), and Sergeant at Arms (Verrette), were required by the PACK Constitution and Bylaws to carry out official duties on behalf of PACK.

Since very early in 1998, Police Chief Congemi was politically opposed to PACK and its agenda. His antagonism arose from the opposition of PACK, its officers, and representatives of other Louisiana labor organizations to his efforts in the state legislature. He specifically urged his staff to encourage members of PACK to quit. He announced that he intended to "get rid of PACK because they were in his way." He repeatedly expressed antipathy to PACK and vowed at staff meetings that he would do PACK injury.

Kenner Retire Lieutenant Trippi, Aff. Op. Rec. Ex. #3. (Pet. App. 51a, 52b and 54a)

On February 23, 1998, Joseph Stagni, a candidate for councilman in Kenner, wrote to PACK requesting an endorsement. (Pet. App. 46a, 51a, 69a). On March 3, 1998, PACK polled its membership concerning the endorsement or opposition to it. (Pet. App. 46a, 51a,71a). On March 10, 1998, Chief Congemi wrote to all PACK members questioning PACK's procedures, requesting that PACK members interview a competing candidate whom Congemi endorsed as "a true friend of every police officer," and asking PACK members write to PACK. (Pet. App. 51a, 52a, 73a). PACK requested and received legal advice which indicated that PACK, as an association or union, was allowed to make political endorsements. On March 13, petitioners, acting as the Executive Board of PACK authorized a $300 contribution to Stagni. (Pet. App. 47a, 53a, 76a). On March 14, PACK provided the candidate with a formal letter of endorsement. (Pet. App. 47a, 53a, 79a). On March 30, 1998, PACK made a $300 contribution to Stagni. (Pet. App. 47a, 80a).

None of the officers ever endorsed candidate Stagni personally, nor individually; none spoke or wrote on behalf of his candidacy. No public statements on behalf of Stagni were made by the officers. No public announcement of PACK Local 8195's endorsement of Stagni was made by the union or its officers. (Pet. App. 49a, 52a and 53a) Candidate Stagni, on his own initiative listed PACK, along with other organizations, including the Kenner Firefighters, the Alliance of Good Government, the Teachers Union, and the AFL-CIO, as supporting him during April 1998. (Pet. App. 53a, 81a). No executive board member or other police officer was named. At no time was any public pronouncement or annunciation made that any of the five petitioner police

officers or any other individual police officers endorsed Stagni. (Pet. App. 49a, 52a, 53a)

On May 4, 1998, Congemi ordered an internal affairs investigation of PACK's officers. On May 7, recorded statements were taken from the officers who confirmed that PACK had endorsed and contributed to a political candidate. On June 1, 1998, Chief Congemi served a pre-termination notice on them. (Pet. App. 47a).

On June 2, 1998, the officers filed a petition in the Twenty-fourth Judicial District Court, for the Parish of Jefferson, seeking protection from discipline arising out of the PACK endorsement. The five officers sought injunctive relief enjoining and prohibiting respondent, Police Chief Congemi, from further harassment of them because of their association with PACK, from further improper investigation of PACK, and from further action against them as a result of the endorsement of a candidate by PACK. On June 4, 1998, the Chief and the City filed a notice of removal to have the case removed to federal court on the basis that it raised a federal question. The officers sought a TRO, which the Court denied as premature, without prejudice.

On Monday, June 15, 1998, Congemi fired PACK's executive officers. Respondents on that same day filed an answer to the petition which was now before the federal court. On June 16, 1999, the court denied the motion for a TRO on the finding that the terminated police officers were not injured irreparably in that they could be remedied by reinstatement with back pay and damages.

On October 6, 1998, PACK sought to intervene to assert its rights in the matter and filed an intervenor complaint. PACK sought a declaration that the respondent

had violated the First and Fourteenth Amendment rights of PACK, Local 8195; an injunction to prevent the respondent from taking discipline or threatening to discipline or take any further employment action, which would impair or chill PACK's First Amendment rights, against any employee of the Kenner Police Department for their association or involvement with PACK; an award of compensatory damages; reinstatement of the Executive Board of PACK; reasonable attorneys' fees and costs; and such other relief as is just and appropriate. The complaint and memorandum in support of it made clear that equitable protection from violations of First and Fourteenth Amendment violation was at the center of the dispute.

On November 23, 1999, Judge Porteous granted the respondents' motion for summary judgment, dismissed with prejudice all federal issues and remanded the remaining state claims back to Louisiana state court. (Pet. App. 17a).

Judge Porteous ruled that Chief Congemi's termination of PACK's officers was legal and a constitutionally permissible act. "The endorsement and subsequent monetary contribution to candidate Stagni by PACK, an association (or union) of Kenner police officers, which was controlled by five plaintiffs in this case, amounted to at least indirect political activity as referenced in the Louisiana statute." He therefore ruled that the doctrine of qualified immunity protected Chief Congemi from "individual official liability" on the basis of a finding that Chief Congemi "did properly comply with the statute [§ 2504]"; that Congemi was entitled to qualified immunity on the basis of a "clearly established" rule; that, therefore, no §1983 claims were available and all federal claims were rejected. He found further that under the Monell doctrine "once it was found that

the actions of the plaintiff fell under [§2503], plaintiffs' §1983 claims against the City necessarily fails." (Pet. App. 17a).

The Court then denied PACK's request for intervention as moot based on its grant of summary judgment as to the underlying case. (Pet. App. 15a)

On December 21, 1999, PACK and the officers filed a notice of appeal. On January 8, 1999, this Court remanded the case to reconsider its references to the City of Kenner as a defendant. On February 23, 1999, the district court again entered judgment for the defendant, including the City of Kenner, as the true defendants represented in the initial state action by Chief Congemi in his official capacity. (Pet. App. 13a) On March 9, 1999, PACK and the officers again noticed their appeal.

On March 21, 2000, in an unpublished opinion, the Fifth Circuit affirmed the judgment of the district court in granting summary judgment for the respondents. (Pet. App.40a). The Fifth Circuit faced squarely the issue of, "whether the concededly constitutional 'Little Hatch Act' of Louisiana, La.R.S. 33:2504, may be enforced against public officers who, acting as representatives of a police officers' association with Kenner, communicated the endorsement of and support for a political candidate" by termination of the five police officer board of the associations. The Court found that such termination was a constitutionally permissible enforcement of a Hatch Act's ban on "indirect political" activity. A petition for a hearing *en banc* was rejected.

REASONS FOR GRANTING THE PETITION

I. A CONFLICT EXISTS AMONG THE COURTS OF APPEALS AS TO THE ENFORCEMENT OF "HATCH ACT" AND "LITTLE HATCH ACT" RESTRICTIONS ON PUBLIC EMPLOYEES THROUGH THE DISCIPLINE OF PUBLIC EMPLOYEE UNION OR ASSOCIATION OFFICERS AS A RESULT OF THEIR OFFICIAL CAPACITY ACTIONS IN EFFECTUATING THE POLITICAL CANDIDATE ENDORSEMENT AND SUPPORT OF THEIR UNION OR ASSOCIATION.

Employer imposed restrictions on the political activities of public employees raise significant constitutional issues. Such restrictions, commonly referred to as "Hatch Act" restrictions on federal employees and "Little Hatch Act" restrictions on state and local government employees, raise serious First Amendment concerns but have a solid constitutional foundation in *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO,* 413 U.S. 528 (1973) (upholding the constitutionality of the federal Hatch Act) and *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (upholding the constitutionality of the Oklahoma "Little Hatch Act").

In interpreting and applying public employer restrictions on civil service employees, "Hatch" restrictions are measured under a *Pickering v. Bd. of Educ.,* 391 U.S. 563 (1968), balancing approach which seeks to apply and interpret such restrictions so as to avoid a constitutional

question. Political endorsements of candidates, especially "indirect" endorsements made not by civil servants in their job related or personal capacity but rather in their off duty non-civil servants capacity as officers of an association or union of civil service employees, raise particularly sensitive problems. Magness, Comment: "Un-Hatching" Federal Employee Political Endorsements," 34 *Pa. L. Rev.* 1497 (1986). Many restrictions on partisan political activity by civil servants are justified by the government's interest in the fair and efficient administration of the law. *Letter Carriers*, 413 U.S. 528 (1973); *Broadrick*, 413 U.S. 601 (1973). Restrictions on supervisory mandates of political support under patronage systems violate basic First Amendment principals. *O'Hare Truck Serv. Inc. v. City of Northlake*, 518 U.S. 712 (1996); *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990); *Branti v. Finkel,* 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976). Restrictions on endorsements by associations or unions of civil servants are less necessary and can restrict the expression of civil servants of their appropriate political interests. Such restrictions can deny employee organizations their constitutionally protected place in debates and campaigns in which the outcome will often determine the most fundamental issues involving public employment. 34 *Pa.L.Rev* 1497 (1986). If a public employer, like a chief of police, can terminate civil servants, like police officers, on the basis of the endorsement and support of an association in which they hold office, the question becomes not how such a restriction balances against the interests of efficiency and lack of corruption in government, but rather, whether the authority of a managerial employee to terminate civil servants for their political endorsements itself supports the establishment of the kind of corrupt, patronage based system which civil service reform and Hatch Acts are intended to remedy.

The application of Hatch Act principles to the political endorsements of associations and unions carried out by their covered civil servant officers has been faced by three Circuit Courts of Appeals and must be faced by the Little Hatch Act systems in place in all fifty states. The Second and the Eleventh Circuits' decision on this important matters conflict both in approach and result with that of the Fifth Circuit in this case. In addition while little Hatch principals are in place in all fifty states, the state systems have not been applied or interpreted to support or authorize the termination of the civil servant union or association officials on the basis of their official capacity participation in the political endorsements and support of their union or association anywhere outside Louisiana.

A. In December 1988, the Second Circuit Court of Appeals ruled that Morris Biller, President of the United States Postal Workers Union, AFL-CIO, and Vincent Sombrotto, President of the National Association of Letter Carriers, AFL-CIO, could not be disciplined under the then effective federal Hatch Act, 5 U.S.C. § 7324(a)(2), by a 60 day suspension on the basis of their unions' expressed support of presidential candidate Walter Mondale against incumbent President Ronald Reagan and their encouragement of union members to vote for Mondale and to contribute to the unions' political action funds. The union officers had been suspended for 60 days based solely on articles and statements in the union publications in 1983 and 1984 endorsing Mondale and urging union members to contribute to the union's financial support of Mondale. The Second Circuit recognized that this Court first upheld the constitutionality of the federal Hatch Act shortly after its enactment. *United Public Workers of America v. Mitchell,* 339 U.S. 75 (1947), and that twenty-six years after *Mitchell*, the constitutionality of Hatch Act restrictions was challenged again in *United States Civil*

Service Commission v. National Association of Letter Carriers, AFL-CIO, 413 U.S. 528 (1973). This Court again validated the Hatch Act. In reviewing these precedents the Second Circuit wrote:

> Significantly, *Letter Carriers* relied on *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), in balancing the employee's interest, as a citizen, to comment on public matters and the "interest of the government, as an employer, in promoting" the efficient rendering of public service. *Pickering* rejected Justice Holmes' view, earlier expressed in *Mitchell* [and relied on by respondent Congemi and Judge Porteous in the district court in this case] that public employment is a privilege. Any suggestion that a public employee "may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as a citizen to comment on matters of public interest. . . proceeds on a premise that has been unequivocally rejected in numerous decisions of this Court. *Pickering*, 391 U.S. at 568".
>
> We discern from these Supreme Court precedents a framework for analyzing alleged Hatch Act violations that balances the government's interest in efficiency and intregity against the employee's rights of free speech and association. [*citations omitted, interdelineation added*].

Biller v. United States Merit System Protection Board, 863 F. 2d 1079, 1088 (2d Cir. 1988). After a review of the competing interest which was dictated by this Court's *Letter Carriers* and *Pickering* precedents, the Circuit Judge Cardamone wrote:

> Following *Mitchell* and *Letter Carriers* we have weighed petitioners' First Amendment rights to express publicly their opinions on political subjects and candidates against the government's interest in promoting the efficiency of public service. Congress' clearly expressed view that when the scales are evenly balanced, the Hatch Act should be construed in favor of the rights of free speech is dispositive. As a consequence, for both charges [endorsing Mondale in the newsletter and urging member contributions] we hold that absent a showing of concerted action with a partisan campaign or organization, petitioners' rights of free expression outweigh the asserted risk of inefficiecy or corrupt government administration. 863 F.2d at 1090.

After *Biller* within the Second Circuit a union's or association's expression of an endorsement for a political candidate and resulting union financial support would not be a valid basis for disciplining union or association officers under "Hatch Act" or "Little Hatch Rules."

B. A similar result would pertain in the Eleventh Circuit. *See Blaylock v. United States Merit Systems Protections Board,* 851 F.2d 1348 (1988) (in which the American Federation of Government Employees', AFL-CIO, ("AFGE") political endorsement and support of Mondale against Reagan expressed by published articles from Kenneth Blaylock, the President of AFGE, resulted in Hatch based discipline of Blaylock and in which the Eleventh Circuit overturned the discipline again on under the rubric that where a statute may read to protect it constitutionality from invalidation under *Pickering* it should be so read).

In 1993 the federal Hatch Act was amended, partially in light of *Biller* and *Blaylock*, to provide that federal employees now may, among other things, express opinions about candidates and issues, contribute money to political organizations, attend political fundraising functions and campain for or against candidates in partisan elections. Federal labor and other employee organizations, may, under the 1993 Amendments, make endorsements, receive and solicit political contributions. *See e.g.* 5 U.S.C. § 7321 et seq. and 5 C.F.R. Part 734; Koca, "Hatch Act - A Primer" at *www.fpmi.com/mgrsum/hatch_act.shtml.*

"Hatched" public employee union or association officers in the Second and Eleventh Circuit could not be disciplined under the Hatch Act restrictions for the political endorsements and support of candidates of their unions or associations under the rules outlined in *Biller* and *Blaylock* and the application of the *Pickering* standard and the standard rule of construction that statutes should be read so as to avoid a finding of unconstitutionality.

C. In addition to the conflict between the treatment of the application of Hatch Act principals so as to avoid a constitutional problem between the Fifth and the Second and Eleventh Circuits, it is clear that public employees on the "Little Hatch Acts" or regulations outside of Louisiana may serve as officers of associations and unions which make political endorsements and lend support to political candidates without subjecting themselves to termination, discipline or other violation of "Little Hatch" restrictions. *See* Public Service Research Foundation, "States' Rules on Civil Service Employees' Political Activities," *www.psrf.org/chart2.html* (which lists 36 states which place no restrictions on employee political activities other than personally running for office and nine states which include

additional restrictions; none but Louisiana restrict associational endorsements).

Perhaps the best example of the standard approach is Oklahoma. The Oklahoma "Little Hatch" system is the one held to be constitutional in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). In Oklahoma, regulated "classified" (covered civil servant) employees may not actively participants in partisan fund raising and may not campaign for a candidate in any way while on duty. The Oklahoma rules do prohibit the participation in prohibited activities "directly or "indirectly" as in the case under the Louisiana Hatch Act. However, the Oklahoma Public Employees Association and its Board of Directors, composed in large part of classified employees, has regularly endorsed and supported candidates over the past fifteen years without the slightest suggestion of anything improper or resulting discipline. *See, e.g.*, 75 Ok. Code Ch. 62 §§ 257.10-1-3 through 10-1-5, and the Oklahoma Ethics Commission web cite, *www.state.okla.us/~ethics*, Informal Opinion IO-99-006. The decisions of both the Oklahoma Commission on Ethics and the Oklahoma Little Hatch Act, at *www.onenet/oklegal*, reveal no case of discipline for associational political endorsements. The fact that classified employees covered by Oklahoma's little Hatch system may, and do regularly, make political endorsements and support candidates through their activities as members of associations of classified employees without fear of discipline was confirmed consistently to counsel for petitioners on August 9-10, 2000, by Kimberlee Williams, Chief Policy Attorney, State of Oklahoma Office of Personnel Management; Marilyn Hughes, Executive Director, Oklahoma State Ethics Commissions; Nancy Nunley, Oklahoma Attorney General's Officer; and Mark Bledsoe, Oklahoma Public Employees Association.

Not only are the activities for which the petitioners were disciplined under the Fifth Circuit's application of the Louisiana "Little Hatch Act" protected activities for classified employees in Oklahoma under the "Little Hatch Act" system authorized under *Broadrick*, but there exists no other reported case, finding, or administrative decision under any of the other existing "Little Hatch Act" systems in which the discipline of officers of an association or union of civil service, classified or other covered employees has been sustained on the basis of their effectuation of a political endorsement or political support of candidates by their association or union. The International Union of Police Associations, AFL-CIO ("I.U.P.A."), represents police officers in 34 states, the District of Columbia, Puerto Rico and the Virgin Islands, employer in over 500 law enforcement agencies. I.U.P.A. and its affiliates do endorse and support political candidates. Each one of those organizations is led by working police officers; prior to the Fifth Circuit's decision no where has one of the officers been disciplined on the basis of the political endorsements or support of the association or union. The widespread political activity of the million member American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME") is widely known and yet the same has been true in AFSCME's case.

If the petitioners in this case were covered by the federal Hatch Act or the Oklahoma Hatch Act, the two Hatch Act statutes which this Court has approved constitutionally, they could not have suffered the termination approved by the Fifth Circuit in this case. If they worked in jurisdictions within the Second or the Eleventh Circuits, they would have been protected by the analysis outlined in *Biller* and *Blaylock*.

This Court should grant *certiorari* in this case in order to ensure the law applicable to all American classified civil

servants to political participation under Hatch Act principals is consistently applied so as to avoid any constitutional infirmity within a system which at one time protects the rights of association and speech of pubic employees under *Pickering* while to the same time not diminishing the *Broadrick* and *Letter Carriers* protections against inefficiency, corruption and patronage based bossism. Such was the result in *Biller* and *Blaylock*; a different analysis with a different result was used by the Fifth Circuit in this case.

II. THE FIFTH CIRCUIT DECISION BELOW CONSTITUTES AN ERRONEOUS INTERPRETATION OF LAW.

The court below relying on *Letter Carriers*, 413 U.S. 548 (1972) and its own earlier precedent in *Wachsman v. City of Dallas*, 704 F.2d 160, 172 (5th Cir. 1983) ruled that:

> [A]cting as officers of their association and through it, the appellants caused a political contribution to, and an endorsement of, candidate Stagni's campaign to be made. Such activities, undertaken 'directly or indirectly" violate the plain language of Section 2504 [of Louisiana's Little Hatch Act]. ...Because Chief Congemi's enforcement of the Little Hatch Act's ban on "direct and indirect" political activity by these appellants [by means of terminating the appellants] was constitutional we do not reach other issues raised on appeal." [*interdelineation supplied*].

This ruling is in reality contrary to both *Wachsman* and the system of analysis and findings set forth in *Letter Carreirs*. The Fifth Circuit displayed on unusual lack of caution in going directly to the issue of the constitutionality of this application of Louisiana's statute without first endeavoring to

the look carefully at the acts involved in an effort to avoid the constitional question as did the Courts in *Biller* and *Blaylock*. The better practice would have yielded a better result.

Neither *Wachsman* nor *Letter Carriers* support the Fifth Circuit determination that a police chief who opposes the political endorsement of an association or union of his police officers may use the admonition of a "Little Hatch Act" that those employees should avoid "directly or indirectly" paying "a contribution to a political organization" or making "a political speech or public political statement on behalf of a candidate" as the basis to terminate the entire executive board of a police association which endorses a candidate for city council opposed by the police chief. This is particularly true where the executive board members played no public role in the endorsement and support, other than communicating it to the candidate in their official capacities and signing the association's donation check in their officer capacities.

A. The Fifth Circuit found *Wachsman v. City of Dallas*, 704 F. 2d 160 (5th Cir. 1987) to be controlling precedent for the proposition that the Louisiana Little Hatch Act can restrict the First Amendment rights of employee organizations even when the association does not make any public announcement of its political endorsement or contribution. However, this holding reflects a misapplication of *Wachsman* and actually conflicts with its holdings. *Wachsman* is distinguishable from this case in at least six ways.

First, *Wachsman*, decided in 1983, involved a question of whether a government can regulate speech in nonpartisan elections, an issue not present in the instant case. In the words of Judge Garwood, the issue in the case was "to what extent may a city regulate the political activities of its

employees when city elections are conducted on a 'nonpartisan' basis?" 704 F.2d 160, 161 (5th Cir. 1983).

Second, and perhaps most significantly, *Wachsman* expressly indicated that the conduct for which the officers were terminated here cannot be regulated by the government. The undisputed facts in *Wachsman* were that "an association or organization of city employees may mail or otherwise distribute endorsements of city council candidates to the city employee members of such organization or association." 704 F.2d at 163. Obviously, if an association can distribute endorsements of candidates to its members, it can make endorsements as long as it does not go out to a public rally under the authority of their public office and publicly announce the endorsement. In this case, the PACK executive board communicated the endorsement only to its members and to Mr. Stagni directly. No public announcement by PACK was made with regard to its endorsement.

Third, *Wachsman* accepted that "the City Charter does not prohibit the Committee, the Committee's members, or Wachsman from contributing to partisan candidates, or from publicly endorsing or actively supporting partisan candidates while **not on duty, in uniform, or in a City office or building.**" 704 F.2d at 163 (*emphasis added*). Thus, the holdings in *Wachsman* do not apply to the type of non-public endorsements made by PACK in this case. No dispute exists here that the PACK executive board effectuated PACK's endorsement of Stagni and contribution to him while off duty, out of uniform and not in a Kenner government office. The very context of this case places it outside of the legal holdings in *Wachsman*. *Wachsman* expressly contemplated that the conduct at issue here is permissible. That case concerned the next step of whether **public** announcements and outwardly vocal support of **nonpartisan**

candidates could be taken by an employee organization, even if only to small groups.

Fourth, the association in *Wachsman* was a political club – something which the Louisiana Little Hatch Act expressly intends to cover. The Committee was "the joint political arm of the Dallas Police Association and the Dallas Professional Firefighters' Association. . . The Committee was formed in 1978 to campaign for a pay increase referendum." 704 F.2d at 162, n.1. The Police Association existed separately from the Committee. In this case, PACK is not a political club. Its purpose is to represent the working interests of the Kenner Police Officers. The fact that it occasionally engages in political speech does not convert it to a political club.

Fifth, the Committee in *Wachsman*, unlike PACK here, did "not claim to have any greater constitutional rights to be free of the regulations in question than those rights which it asserts are possessed by and applicable to its city employee members." 704 F.2d at 163. PACK and its executive board, on the other hand, have consistently asserted that although the Little Hatch Act may constitutionally restrict the police officers' individual political speech rights, it cannot be so broad as to restrict the rights of a separate association which has its own First Amendment rights.

Finally, the language in *Wachsman* does not support the result reached here. *Wachsman* expressly stated that it was concerned about allowing an employee organization to make a public announcement of an endorsement at a political gathering. The Court's concern was that the announcement of a political endorsement at a public gathering by an official spokesperson for an organization would convert the gathering to a political gathering. It is the public announcement at a

political gathering which "carries with it all the pernicious possibilities inherent in allowing individual employees to so address political gatherings." 704 F.2d at 172. Relying almost exclusively on this language, the panel found that PACK's executive board could be terminated for PACK's non-public endorsement of, and contribution to, Candidate Stagni. Yet, the concerns of *Wachsman* – that an official spokesperson for the association would make a public pronouncement of the endorsement at a gathering thereby converting the gathering to a political gathering – simply do not exist in the facts at hand. No PACK executive board member ever publicly announced PACK's endorsement; no PACK executive board member ever made any public appearance as an official or unofficial spokesperson for PACK with regard to the election; no PACK executive board member ever addressed any gathering to announce PACK's endorsement.

In case there could be any remaining doubt that *Wachsman* only involved the public announcement of endorsements by the association itself, *Wachsman* added that the association's release of an endorsement through any news medium would invoke the same analysis as that applied to endorsements before political gatherings. "It is a formal public endorsement and therefore can be validly restricted." 704 F.2d at 173, n. 20 (emphasis added). Interestingly, the Fifth Circuit's decision in the instant case omitted this language from the quoted section of *Wachsman*. Yet this very language confirms that *Wachsman* only considered "formal public endorsements" as those which could be validly restricted. The type of non-public endorsement issued by PACK, communicated by PACK only to its own members and to the candidate himself, and communicated outside of the officers' police duty hours, out of uniform, and off of government property is not the type of speech *Wachsman*

could be validly restricted. The reliance on *Wachsman* as controlling precedent in this case was unfounded.

B. The Fifth Circuit's expansion of *Wachsman* to allow a police chief to fire an association's entire executive board because the association voted in a private meeting to endorse a candidate and communicated that endorsement only to its members and to the candidate himself unconstitutionally infringes on the First Amendment rights of associations. Such a broadening of *Wachsman* further impedes dozens, if not hundreds, of employee organizations that engage in political speech, and restricts associations in the Fifth Circuit to a degree unheard of in other Circuits throughout the Country.

The heart of this case revolves around the degree to which the clearly established First Amendment rights of association, petition, and political activity enjoyed by public employee associations and unions set forth in *Smith v. Arkansas State Highway Employees*, 441 U.S. 463 (1979), are subject to restriction under the *Pickering v. Board of Education*, 391 U.S. 563 (1968), balancing test applicable to "Little Hatch Acts" as outlined in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), and its companion case *U.S. Civil Service v. National Association of Letter Carriers AFL-CIO*, 413 U.S. 548 (1973).[1]

---

1. This case does not raise the following settled issues:

(a) the constitutionality of the Louisiana "Little Hatch Act", §2504 itself;

(b) whether a distinction might exist between partisan and non-partisan activity;

(c) whether the statute's provision limits both

Seven years ago, the Fifth Circuit recognized that as early as "1987 it was clear that the First Amendment protects an employee's right to association with a union." *Boddie v. Columbia*, 989 F.2d 745 (5th Cir. 1993)(citations omitted); *see also Brady v. Fort Bend Co.*, 58 F.3d 173, 176 (5th Cir. 1995). Speaking almost directly to this case, the Fifth Circuit declared:

> The right to association encompasses the right of public employees to join unions and the right of their unions to engage in advocacy and to petition the government in their behalf. Thus, the First Amendment is violated by state action whose purpose is either to intimidate public employees from joining a union or from taking an active part in its affairs or to retaliate against those who do.

Boddie v. Columbia, 989 F.2d at 749 (5th Cir. 1993)(citing *PACE v. El Paso Co. Com. Col. Dist.*, 739 F.2d 258, 262 (5th Cir. 1984)). Yet, the decision here is directly contrary to these cases and undermines the Constitutional principles behind them.

Civil service employees' First Amendment Free Speech rights are limited by the "Little Hatch Act," in part, because their association remains free in its political speech and the officers remain free in their associational rights. *See*,

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by "collusion and indirection what they may not lawfully do directly and openly"; or

(d) whether the statute restricts membership in avowedly "political clubs or organizations" in which civil service employees act as "official spokesmen" for the organization in its public political activities.

Broadrick v. Oklahoma, 413 U.S. 601 (1973); and Magness, Comment: "Un-Hatching Federal Employees Political Endorsement," 134 *U. Pa. L. Rev.* 1497 (1986). The balancing done in *Broadrick* weighed the need to protect public employment from political coercion of the type evidenced by Chief Congemi here and to ensure that the general citizenry is not given the impression, for example, that individual police officers, as police officers, are supporting the election of one candidate over an other. These interests outweigh the need for active public political involvement by civil servants themselves; however, the interest of associations of civil servants which seek to take part in our political discourse in a manner in which individual members do not express political views publicly, are not outweighed by the protection afforded those principles under *Broadrick*. Magness, *34 Pa.L. Rev.* 1497 (1986). If Chief Congemi is allowed based on his own candidate preferences to terminate his subordinates for the political speech of their association, *Broadrick's* goal of protecting a proper functioning of free public discourse will be undermined, not advanced.

If La. R.S. § 2504's restriction on "indirect" political endorsement and support can be constitutionally expanded to require the termination of union officers for acting in private to perform their duties as union officers, then First Amendment association and petition rights of civil service associations and unions are limited far more radically by the "Little Hatch Acts" than they have ever been before. The panel's decision will radically alter the landscape of free political speech in the Fifth Circuit, while in other Circuits through out the Country, employees' rights to engage in political speech is aggressively protected. *See, e.g., DiRuzza v. County of Tehama*, 206 F.3d 1304,(9th Cir. 2000).

While Associations' rights to engage in public political activity implemented even through the private, off-duty, activity of its "hatched" civil service officers remain protected outside the Fifth Circuit, organizations within the Fifth Circuit as diverse as a local chapter of the NAACP, a state AFL-CIO, a local Criminal Justice Commission, a Federation of Teachers, a Kawanis club, a Christian Law Enforcement Officers Association, or a local National Organization of Women chapter which has civil servants on its executive board, as well as the hundreds of local unions from police to fire fighters to teachers to clerical staff, will be prohibited from engaging in political activities which, prior to the decision below, were protected First Amendment speech. In candidate Stagni's list of his supporters, he included the following: Alliance for Good Government, AFL-CIO, Jefferson Federation of Teachers, Jefferson Parish Councilman John Lavarine, Jefferson Independent Voter Association, Kenner Fire Fighter Association, Police Association City of Kenner, Kenner Councilman John Lavarine, III, Louisiana Criminal Justice Commission, Spanish American Business Association and Coach J.T. Curtis. These organizations and similar organizations throughout the Fifth Circuit who have civil servants on their executive board will be effectively prohibited from engaging in their First Amendment political expression in future elections if the Fifth Circuit's decision is law.

Conclusion

For the reasons stated above, the petition for *certiorari* should be granted.

Respectfully submitted,

Michael T. Leibig*
Elizabeth Ippolito
Kimberly Simon
ZWERDLING, PAUL,
LEIBIG, KAHN,
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4012 Williamsburg Court
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Counsel for Plaintiffs-
Petitioners

**Counsel of Record*

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-30258

WESTLY WEST; DENNIS LYNCH; ROBERT POLITO;
HENRY JAUME; BRUCE VERRETTE,

Plaintiffs-Appellants,

versus

NICK A. CONGEMI, Chief of Police; CITY OF KENNER,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi [sic]
(Eastern District of Louisiana)
Lower Court No. 98-CV-1654-T

Filed: March 21, 2000

Before JONES, DUHE, and WIENER, Circuit Judges.

PER CURIAM:*

Having carefully considered this appeal in light of the briefs, oral arguments, and pertinent portions of the record, we

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except for the limited circumstances set forth in 5TH CIR. R. 47.5.4.

agree with the district court's analysis of the issues and affirm largely for the reasons stated in its opinion entered November 23, 1998.

The issue is whether the concededly constitutional "Little Hatch Act" of Louisiana, LA. R. S. 33:2504, may be enforced against police officers who, acting as representatives of a police officers' association in Kenner, communicated the association's endorsement of and support for a political candidate. Police Chief Congemi fired the appellants according to the direct command of the statute.

On appeal, counsel for appellants has been less than forthright in distinguishing between his individual clients' interest and that of the association, which was not permitted to intervene in the district court.[1] Notwithstanding the confusion, we construe appellants' complaint to be that although they were legitimately forbidden by the Little Hatch Act from personally engaging in political activities covered by that statute while employed as civil servants, the statute may not constitutionally be applied to them when they act as officers of the association. To do so, appellants claim, violates their First Amendment speech and association rights.

Acting as officers of their association and through it, the appellants caused a political contribution to, and an endorsement of, Candidate Stagni's campaign to be made. Such

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[1] Appellants' brief states: "The issue involved here is rather whether associations and unions of civil service employees may be made a target for attack and prevented from making political endorcements in their own name by the strategy of terminating union officers who carry out the official acts of the organization in private and without identifying themselves publicly in any way as civil servants." One might think that the association, rather than the police officers is the appellant.

But the association could -- and did -- notice an appeal only from the denial of intervention, a point which was not briefed and is therefore waived.

activities, undertaken "directly or indirectly," violate the plain language of Section 2504. Appellants contend, however, that when they act as association officers, their conduct is shielded from the prohibitions of the Little Hatch Act. We disagree. Like the district court, we conclude that this court's decision in *Wachsman v. City of Dallas,* 704 F.2d 160, 172 (5th Cir. 1983) is controlling:

> One further problem deserves our attention before we address the restrictions on contributions. The district court's invalidation of section 16(b)(1) regarding endorsements presented at nonpolitical gatherings applied only to individual employees, and not to their organizations. The Committee asserts that this ruling ignores its first amendment rights. These rights are derived from the individual members' associational and speech rights, see Citizens Against Rent Control, and from the public's right to free and uninhibited comment on political issues. *See Bellotti.* Although the district court failed to state why it reached different conclusions regarding Wachsman and the Committee, we perceive an appropriate distinction that justifies its order.
>
> [3] The Committee must act through a spokesman. Regarding individual employees, the court was obviously concerned with limiting an employee's right to endorse a candidate at a private and/or nonpolitical gathering (*e.g.*, a Kiwanis Club meeting or a neighborhood barbecue). Such a setting suggests a public employee acting as a private citizen. *This suggestion, however, does not fit a situation in which an official spokesman for an organization of city employees announces in that capacity the organization's endorsement of a particular city council candidate. The latter carries with it all the*

> *pernicious possibilities inherent in allowing individual employees to so address political gatherings.* The arrival of an official spokesman bearing such an endorsement largely imbues a gathering with a political flavor. Indeed, the appellant Committee here is the avowedly political arm of the city employee police and firefighters organizations. Thus, the City's interests in prohibiting endorsements will be present in any situation in which an organization *173 of city employees desires to make an endorsement. Therefore, the trial court's order in this regard is affirmed. (footnote omitted/emphasis added).

Wachsman and the district court also relied on the Supreme Court's decision in *U.S. Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880 (1973), upholding similar restrictions on political activity by civil servants.

Because Chief Congemi's enforcement of the Little Hatch Act's ban on "direct or indirect" political activity by these appellants was constitutional, we need not reach the other issues raised on appeal. The judgement of the district court in favor of appellees is affirmed.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-30258
USDC No. 98-CV-1654

WESTLY WEST, DENNIS LYNCH, ROBERT POLITO,
HENRY JAUME, BRUCE VERRETTE,

Plaintiffs-Appellants,

POLICE ASSOCIATION CITY OF KENNER,
International Union of Police
Associations, Local 8195, AFL-CIO,

Intervenor Plaintiff - Appellant,

versus

NICK A. CONGEMI, Chief of Police,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

Filed: January 5, 1999

Before HIGGINBOTHAM, DeMOSS, and BENAVIDES,
Circuit Judges.

BY THE COURT:

In a letter filed in this court on December 29, 1998, the district court has requested that the above-referenced civil rights action "be remanded under Federal Rule of Civil Procedure 60(b), so that the court can correct an error concerning references to the City of Kenner as being a defendant in the suit." A district court cannot correct a judgment pursuant Rule 60(b) while an appeal is pending without obtaining leave of the court of appeals. *See Willie v. Continental Oil Co.*, 746 F.2d 1041, 1046 (5th Cir. 1984), and cases cited therein, *vacated by grant of rehearing en banc*, 760 F.2d 87 (5th Cir. 1985), *on rehearing*, 784 F.2d 706 (5th Cir. 1986) (en banc). *See also Travelers Ins. Co. v. Liljeberg Enterprises, Inc.*, 38 F.3d 1404, 1407 n.3 (5th Cir. 1994) (citing panel opinion in *Willie*). Accordingly, we treat the district court's letter as a request for authorization from this court to correct the judgment pursuant to Rule 60(b). We grant such request, and remand the case for further proceedings, if necessary.

We do not retain jurisdiction, and therefore any party desiring to appeal when a new final judgment is entered must file a notice of appeal at that time.

REMANDED.

/s/ Kenneth Lotz

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

January 5, 1999

Ms Loretta Whyte, Clerk
Eastern District of Louisiana, New Orleans
United States District Court
500 Camp Street
Room C-151
New Orleans, LA 70130

No. 98-31407 West v. Congemi
USDC No. 98-CV-1654

Enclosed is a certified copy of the judgment issued as the mandate.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: /s/ Kenneth Lotz
Kenneth Lotz, Deputy Clerk

cc: w/encl:
Mr Michael T Leibig
Mr Keith R Credo
Mr Philip John Boudousque
Mr Gerald Joseph Nielsen

MDT-1

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 98-1654
SECTION "T" (2)

WEST, ET AL

VERSUS

CONGEMI

Filed: February 19, 1999
Date of Entry: February 23, 1999

ORDER AND REASONS

I. *BACKGROUND*

In the above-captioned matter, the Court issued both an Order and Reasons (Doc. #27) and a Judgment (Doc. #26) on November 23, 1999. These two documents purported to include the City of Kenner as a named defendant in this suit. After receiving notice of plaintiffs' appeal of this Court's judgment, including notice of a potential problem with this Court's holdings regarding the City of Kenner, this Court requested and received permission from the United States Court of Appeals for the Fifth Circuit under FRCP 60(b) to revisit this Court's judgment. Evidenced by Document #30, the Court of Appeals remanded this matter back to this Court for further disposition.

II. *LEGAL ANALYSIS*

The question before the Court is whether or not its decision to include the City of Kenner as defendant in both its Order and Reasons and its Judgment was proper in light of the record. After receiving briefing on the issue from both the plaintiffs and the defendants, this Court concludes that its action were appropriate. Both sides in this suit agree with the Court's recognition of the City of Kenner as a defendant here, as displayed in their memoranda submitted to the Court on that issue.

In support of this position, the Court points first to *Hafer v. Menlo*, 502 U.S. 21, 25, 112 S.Ct. 358, 361, 116 L.Ed.2d 301 (1991), where the Supreme Court stated as follows:

> In *Kentucky v. Graham,* 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985), the Court sought to eliminate lingering confusion about the distinction between personal- and official-capacity suits. We emphasized that official -capacity suits '"generally represent only another way of pleading an action against an entity of which an officer is an agent."' *Id.*, at 165, 105 S.Ct., at 3104 (quoting *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, n. 55, 98 S.Ct. 2018, 2035, n. 55, 56 L.Ed.2d 611 (1978)). Suits against state officials in their official capacity therefore should be treated as suits against the State. 473 U.S., at 166, 105 S.Ct., at 3105.

With similar reasoning the Supreme Court reached the following conclusions in yet another case:

> Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. See, e.g., *Scheuer v. Rhodes*, 416 U.S. 232, 237-238, 94 S.Ct. 1683, 1686-

> 1687, 40 L.Ed.2d 90 (1974). Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 690, n. 55, 98 S.Ct. 2018, 2035, n. 55, 56 L.Ed.2d 611 (1978). As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. *Brandon*, supra, 469 U.S., at 471-472, 105 S.Ct., at 878. It is not a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.

Kentucky v. Graham, 473 U.S. at 165-166, 105 S.Ct. at 3105 (footnote omitted); *see also Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1244-1246 (6th Cir. 1989) (containing a thorough analysis of the law, reasoning that the *Monell* doctrine properly applied whether municipality was formally named in suit or whether merely individual was named in his official capacity).

Therefore, this Court, having reviewed the record and the applicable law, particularly the plaintiffs' complaint and the defendants' answer, hereby finds that its rulings with regard to the City of Kenner as a defendant in this suit were appropriate. Clearly, Chief Congemi was named as a defendant in his official-capacity, and such a complaint can serve as another way of pleading an action against the City of Kenner of which Chief Congemi may be an agent. Throughout the proceedings, both the plaintiffs and the defendants treated the City of Kenner

as a defendant at all times; therefore, it is proper to apply the clear precedent of the United States Supreme Court in maintaining this Court's previous stance as to the inclusion of the City of Kenner in this suit.[1]

Accordingly,

IT IS ORDERED that the earlier dismissal of the plaintiffs' claims against the City of Kenner was appropriate under the prevailing law. Therefore, the Court reiterates its earlier conclusions, which are that the federal §1983 claims of the plaintiffs against the City of Kenner are **DISMISSED, WITH PREJUDICE,** and that the remaining state law claims are **REMANDED** back to Louisiana state court.

To avoid confusion the Court will restate its earlier orders contained in Document #27.

IT IS FURTHER ORDERED that the motion of the defendants, Chief Congemi and the City of Kenner, for summary judgment with regard to the plaintiffs's federal §1983 claims is **GRANTED**.

IT IS FURTHER ORDERED that the motion of the defendants for summary judgment as to all pending state law

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[1] Whether or not the City of Kenner was properly named as a defendant in this suit makes no difference as to what substantive law applies here. The *Monell* doctrine is applicable whether the Court views the defendant as being the City of Kenner or Chief Congemi in his official capacity. Moreover, the Court notes that it is very clear that Chief Congemi was sued in his official capacity by the plaintiffs in their original complaint. The same substantive result would occur in either instance, since under the case law mentioned above, "[a]s long as the government entity receives notice and an opportunity to respond, an official -capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S. at 165-166, 105 S.Ct. At 3105 (citation omitted).

claims is **DENIED.** The remaining state law claims are **REMANDED** back to Louisiana state court.

IT IS FURTHER ORDERED that the plaintiffs' cross motion for summary judgment is **DENIED.**

New Orleans, Louisiana, this 19th day of February, 1999.

/s/ G. Thomas Porteous Jr.
G. THOMAS PORTEOUS, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 98-1654
SECTION "T" (2)

WEST, ET AL

VERSUS

CONGEMI

Filed: February 19, 1999
Date of Entry: February 23, 1999

JUDGMENT

The Court, having granted the Motion of defendants, Nick Congemi and the City of Kenner, for Summary Judgment against the plaintiffs, Westley West, Dennis Lynch, Robert Polito, Henry Jaume, and Bruce Verrette, in the above captioned case, it is the decision of this Court that judgment be entered in favor of the defendants. The Court also enters judgment here having reconsidered its earlier inclusion of the City of Kenner as a defendant pursuant to the order of the United States Court of Appeals for the Fifth Circuit. The Court finds that the inclusion of the City of Kenner was proper.

Accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Nick Congemi and the City of Kenner, for Summary Judgment against the

plaintiffs, Westley West, Dennis Lynch, Robert Polito, Henry Jaume, and Bruce Verrette, dismissing all federal claims, **WITH PREJUDICE**, and that all state law claims previously pending before this Court are **REMANDED** back to state court.

New Orleans, Louisiana this 19th day of February, 1999.

/s/ G. Thomas Porteous Jr.
G. THOMAS PORTEOUS, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX E

MINUTE ENTRY
PORTEOUS, J.
November 24, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 98-1654
SECTION "T" (2)

WEST, ET AL

VERSUS

CONGEMI

Filed: November 30, 1998
Date of Entry: December 1, 1998

The Court, having granted the Motion of defendants, Nick Congemi and the City of Kenner, for Summary Judgment against the plaintiffs, Westley West, Dennis Lynch, Robert Polito, Henry Jaume, and Bruce Verrette, in the above captioned case, hereby finds that the motion of the Police Association to intervene in this matter, previously set for hearing on November 24, 1998, thereafter continued without date by this Court, is now rendered moot.

Accordingly,

IT IS ORDERED that the Police Association's motion to intervene in this matter is now **MOOT**.

New Orleans, Louisiana, this 30th day of November, 1998.

/s/ G. Thomas Porteous Jr.

G. THOMAS PORTEOUS, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 98-1654
SECTION "T" (2)

WEST, ET AL

VERSUS

CONGEMI

Filed: November 23, 1998
Date of Entry: November 24, 1998

This cause came for hearing on a previous date upon the cross motions for summary judgment by defendants, Nick Congemi and the City of Kenner, and the plaintiffs, Westley West, Dennis Lynch, Robert Polito, Henry Jaume, and Bruce Verrette (hereinafter, "plaintiffs"). Oral argument was entered by the Court on November 4, 1998.

The Court, having studied the memoranda submitted by the parties and having considered the oral arguments set forth by counsel, is fully advised in the premises and ready to rule.

ORDER AND REASONS

I. *BACKGROUND*

The plaintiffs were each members of the Classified Civil Service of the City of Kenner Police Department. The plaintiffs' activities, at all material times, were subject to the

prohibitions contained in La.R.S. 33:2504 (hereinafter, "§2504") (set forth later). The five plaintiffs were also actively involved in the Police Association City of Kenner (hereinafter, "PACK"). It is disputed as to whether PACK was a union or a non-union association. At all relevant times defendant Nick Congemi was the Chief of Police of the Kenner Police Department.

On or about February 23, 1998, Joseph Stagni, candidate for Councilman-at-Large for the City of Kenner, wrote to PACK and asked for PACK to endorse him. Plaintiffs, who allege themselves to comprise the Executive Board of PACK, contend that they polled PACK's membership after Stagni's request to determine whether PACK should endorse Stagni as a political candidate. The plaintiffs allege further that Chief Congemi communicated his opposition regarding PACK's support of candidate Stagni, allegedly indicating that PACK members should be wary of any political support that they might offer to candidate Stagni. Moreover, plaintiffs maintain that Chief Congemi continually exhibited his animosity towards PACK.

The plaintiffs allege that through PACK they voted to support candidate Stagni after receiving the advice of counsel that they could do so without fear of adverse legal consequences. After voting to support candidate Stagni, the plaintiffs, through their alleged positions on the Executive Board of PACK, notified Stagni that PACK would endorse his candidacy, and provided Stagni with a monetary contribution of $300.[1] The letter endorsing Stagni was distributed to other

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[1] While the plaintiff's maintain that the only support that they provided Stagni was through PACK, it should be noted that the plaintiffs did personally sign the letter displaying PACK's support of Stagni. Also, defendants contest whether the plaintiffs were actually executive board members of PACK at all, since they failed to follow the appropriate

Kenner Civil Service employees. Moreover, PACK's endorsement of Stagni was publicly announced by Stagni during his campaign.

After conducting an internal affairs investigation, Chief Congemi terminated the five plaintiffs in June of 1998. The plaintiffs contend that they were terminated solely because of Chief Congemi's hatred of the plaintiffs and their association (PACK).

The defendants note that the Office of the State Examiner made it plainly clear to the plaintiffs, even before they engaged in any political activity, that such activity, engaged in either directly or indirectly, was expressly prohibited by Louisiana state law. These warnings were in the form of direct responses to inquiries by the plaintiffs (including copies of applicable Attorney General Opinions), as well as a newsletter distributed to plaintiffs and instructions posted on bulletin boards located throughout the Kenner Police Department. The defendants contend that these warnings provided actual knowledge to the plaintiffs that any political activity undertaken by them was proscribed by law (and that any violation would result in mandated termination).

The defendants also dispute the procedure followed by the plaintiffs in their acts as alleged executive board members. The defendants claim that the letter of March 3, 1998 indicates that the decision to endorse Stagni had already been made by the individual plaintiffs before any vote by the general membership

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electoral procedures as set forth in PACK's charter (?). Furthermore, with regard to the $300 contribution, the defendants claim that it is undisputed that this donation did not occur as a result of any decision of PACK as an association, but was distributed as a result only of the plaintiffs actions.

of PACK.[2] Defendants contend that no vote ever took place. Moreover, the defendants point to a letter written by thirteen members of PACK, who objected to the process followed by the plaintiffs in their decision to have PACK support Stagni.

In April of 1998, Chief Congemi received recommendations and/or opinions from Gerald Nielsen and Susan Weldon (Congemi's current counsel), and from Philip Boudousque (counsel for Kenner Police Department) indicating that how plaintiffs' political activity should be viewed in light of La.R.S. 33:2504A(4) and 33:2504B.

As indicated by the plaintiff, Chief Congemi commenced a formal internal affairs investigation. During this investigation Congemi tried to obtained documents from plaintiffs' counsel, but was unsuccessful. Moreover, Congemi did obtain advice from a lawyer, Ralph Zatkis, concerning the possible violation of any labor laws. Zatkis informed Congemi that the enforcement of §2504 would not implicate any labor laws. Congemi also obtained advice from Nielsen and Weldon during the internal affairs investigation to make sure that he did not violate any laws.

Chief Congemi maintains that he followed appropriate pre-termination procedures, including providing written notice to the plaintiffs regarding a pre-termination hearing.[3] The pre-

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[2] The defendants assert that votes by the PACK membership were normally done by secret ballot vote. Defendants contend that this was not how the decisions to endorse and contribute money to candidate Stagni were arrived at by PACK.

[3] Before the pre-termination hearing could be held, the plaintiffs sought injunctive relief and damages in state court pursuant to 42 U.S.C. §1983. This state court suit was removed to this federal court by the defendants. On June 4, 1998, this Court declined to issue a TRO, but noted that it would reconsider the issue of a preliminary injunction after Congemi made his final decision as to whether the plaintiffs would actually be terminated.

termination hearing was eventually held on June 4, 1998. Defendants contend that at the pre-termination hearing, the plaintiffs only provided a copy of the $300 contribution check, a copy of PACK's letter of endorsement to Stagni, and a copy of the certificate of filing of PACK's Articles of Incorporation. On Monday, June 15, 1998, Chief Congemi, citing the mandates of §2504, terminated the five plaintiffs. The defendants contend that the post-termination process currently being complied with satisfies all concerns of due process. *See* La.R.S. 33:2501 (setting forth Louisiana law regarding the required post-termination procedures in this situation). The hearing with the Kenner Civil Service Board has yet to be completed.

In the conclusion of the defendants' motion for summary judgment, they state as follows:

> Each of the Plaintiffs' terminations were predicated upon four separate violations of La.R.S. 33:2504. If this Honorable Court finds a violation as to the contribution, ***or*** a violation as to acting as a factional club, ***or*** agrees that the various letters and campaign materials qualify as a public statement, ***or*** agrees that any act taken by the Plaintiffs constitutes an act which qualifies as "taking any part" in a political campaign, then, there is no *genuine* dispute of *material* fact, for the statute *has* been violated. In that event, La.R.S. 33:2504B states, "The appointing authority *shall* discharge from the service any employee whom he deems guilty of violating any *one* or more of the provisions of this section." Under this provision, if this Honorable Court agrees that *any* of the four portions of the R.S. 33:2504A(3) or A(4) were violated, Chief Congemi had absolutely no choice. He was under a mandatory and non-discretionary duty

> tendered to him by the Louisiana Legislature, to uphold this "essential" principal of government.

Doc. #14.

The plaintiffs oppose the motion of the defendants, and move for summary judgment themselves, contending that Louisiana law does not mandate that Chief Congemi interfere with the inner workings of PACK's activity.[4] The plaintiffs believe that they were acting as executive board members of PACK, and that it was PACK that endorsed and contributed to Stagni, not them as individuals. The plaintiffs move for summary judgment, claiming that "the heart of the case is a legal question of whether Chief's termination of the Executive Board members for the Union's [(PACK's)] political speech violates their Constitutional rights." Doc. #19.[5] It is very important to note that the Plaintiffs do not claim that the state statute at issue is unconstitutional, but claim that Chief Congemi erroneously enforced it.

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[4] In their motion for summary judgment and in their opposition to defendants' motion for summary judgment, the plaintiffs make claims based on the fact that PACK is a union. That fact is under dispute. Even some of the plaintiffs have indicated in their depositions that PACK was a non-union association.

[5] In their memoranda regarding the motions at issue, the plaintiffs most specifically refer to the interference with their constitutionally protected right of association. The defendants correctly point out that in their complaint the plaintiffs only raised the constitutional claims of denial of "due process" and denial of "equal protection." The defendants assert that there are no claims in plaintiffs' petition that mention freedom of association or freedom of speech.

II. *LEGAL ANALYSIS*

A. *Law on Summary Judgment*

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ.P. 56(c). "The party moving for summary judgment bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact." *Stults v. Conoco,* 76 F.3d 651 (5th Cir. 1996), (citing *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 912-13 (5th Cir.) (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. The nonmoving party must come forward with "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (emphasis supplied): *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995).

Thus, where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial." *Matsushita Elec. Industrial Co.*, 475 U.S. at 588. Finally, the court notes that substantive law determines the materiality of facts and only "facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

B. *42 U.S.C. §1983 and Qualified Immunity – Individual Official Liability*

A determination of whether a public official is entitled to qualified immunity from liability under §1983 involves essentially a three-step analysis. The first step is to identify the specific constitutional right allegedly infringed. *See Albright v. Oliver*, 510 U.S. 266, 271, 114 S.Ct. 807, 811-812 (1994) ("Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.' [citation omitted]. The first step in any such claim is to identify the specific constitutional right allegedly infringed. [citation omitted].") Secondly, the court must determine whether the factual claims of the plaintiff, if proven, actually establish a violation of the said identified and specific constitutional right. *See Siegert v. Gilley*, 500 U.S. 226, 233, 111 S.Ct. 1789, 1793 (1991) ("Decision of this purely legal question permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits."). The third and final step is only taken if step two is resolved in the defendant's favor. *See Samaad v. City of Dallas*, 940 F.2d 925, 940 (5th Cir. 1991). If the court determines that the claims of the plaintiff do establish a violation of a specific constitutional right, then the court must ascertain whether the constitutional right asserted by the plaintiff to have been violated by the defendant was "clearly established" at the time the defendant acted. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982) ("[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."); *see also Melear v.*

Spears, 962 F.2d 1177, 1183 (5th Cir. 1989) (The unlawfulness of the act must be apparent in light of preexisting law.).

The qualified immunity doctrine attempts to balance society's interest in redressing private injury against the risk of interfering with governmental functions. *See James v. Sadler*, 909 F.2d 834, 838 (5th Cir. 1990). Thus, it is the party seeking damages from an official asserting qualified immunity that bears the burden of overcoming that defense. *Hart v. O'Brien*, 127 F.3d 424, 441-442 (5th Cir. 1997).

The Court will now examine the claims of the plaintiffs to determine what specific constitutional right has allegedly been infringed, and whether the factual claims of the plaintiff, if proven, actually establish a violation of the said identified and specific constitutional right. In their pleading, the plaintiffs complain of violations of due process, equal protection, and First Amendment rights of association and free speech.[6] The plaintiffs claim that Chief Congemi terminated them under the guise of La.R.S. 33:2504 to further his own interests. Congemi counters that these terminations were mandates by the Louisiana statute, giving him no choice in the matter.

At issue is La. R.S. 33:2504. In pertinent part, that statute states as follows:

> §2504. Political activities prohibited
>
> A. Political activities by and extending to employees of the classified service are hereby prohibited as follows:
>
> (1) No person shall seek or attempt to use any political endorsement in connection with any

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[6] There is some dispute as to whether the plaintiffs properly plead violations of the right to association and right to free speech. However, this Court will address those claims since they do not have an effect on this Court's findings.

appointment to a position in the classified service.

(2) No person shall use or promise to use, directly or indirectly, any official authority or influence, whether possessed or anticipated, to secure or attempt to secure for any person an appointment or advantage in appointment to a position in the classified service, or an increase in pay or other advantage in employment in any such position, for the purpose of influencing the vote or political action of any person, or for any consideration.

(3) No employee in the classified service shall, directly or indirectly, pay, or promise to pay, any assessment, subscription, or contribution for any political organization or purpose, or solicit or take part in soliciting any such assessment, subscription, or contribution. No person shall solicit any such assessment, subscription, or contribution of any employee in classified service. The prohibitions of this Subsection shall not be construed as applying to membership dues paid, or contributions made, to non-political employee organizations, pension funds, civic enterprises, the Louisiana Civil Service League or any similar non-political and non-partisan organization.

(4) No employee in the classified service shall (a) be a member of any national, state, or local committee of a political party, (b) be an officer or member of a committee of any factional, political club or organization, (c) be a candidate for nomination or election to public

> office, (d) make any political speech or public political statement in behalf of any candidate seeking to be elected to public office, or (e) take any part in the management or affairs of any political party or in the political campaign of any candidate for public office, except to privately express his opinion and to cast his vote . . .
>
> B. The appointing authority shall discharge from the service any employee whom he deems guilty of violating any one or more of the provisions of this Section. The board may, upon its own initiative, investigate any officer or employee in the classified service whom it reasonably believes guilty of violating any one or more of the provisions. Any citizen, taxpayer, municipal officer, or employee may file with the board detailed charges in writing against any employee in the classified service for violating any one or more of the provisions of this Section. The board shall, within thirty days after receiving the written charges, hold a public hearing and investigation and determine whether such charges are true and correct. If the board should find upon its investigation of any employee that he has violated any of the foregoing provisions, the board shall order the appointing authority to forthwith discharge the guilty employee from the service and the appointing authority shall forthwith discharge the employee....

If there has been no constitutional violation, then there is no need to address further the doctrine of qualified immunity. *See Siegert,* 500 U.S. 226, 111 S.Ct. 1789.

The Court notes that even the plaintiffs have agreed that §2504 is constitutional. The law is well established that both the states and the federal government can regulate certain

political activity of civil servants. *See U.S. Civil Service Commission v. National Association of Letter Carriers AFL-CIO*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973) (Here, the Supreme Court reaffirmed *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947). The Court explicitly stated that a law that "forbade activities such as organizing a political party or club; actively participating in fund-raising activities for a partisan candidate or political party; becoming a partisan candidate for, or campaigning for, an elective public office; actively managing the campaign of a partisan candidate for public office; initiating or circulating a partisan nominating petition or soliciting votes for a partisan candidate for public office; or serving as a delegate, alternate or proxy to a political party convention" would be "unquestionably...valid." Furthermore, the Court observed that the rights to associate and participate in politics are not absolute and that federal employees' political activities could be constitutionally prohibited); *see also Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) (This was a companion case to *Letter Carriers*. Here, the challenged provision was a state statute that restricted civil servants' political activities in a manner similar to the Hatch Act. The challenge was based on the contention that the statute's prohibitions were vague and overbroad. The Court disagreed, and held that "at least insofar as it forbids classified employees from: soliciting contributions for political candidates, political parties, or other partisan political purposes; becoming members of national, state, or local committees of political parties, or officers or committee members in partisan political clubs, or candidates for any paid public office; taking part in the management or affairs of any political party's partisan political campaign; serving as delegates or alternates to caucuses or conventions of political parties; addressing or taking an active part in partisan political rallies or meetings; soliciting votes or assisting voters at the polls or helping in a

partisan effort to get voters to the polls; participating in the distribution of partisan campaign literature; initiating or circulating partisan nominating petitions; or riding in caravans for any political party or partisan political candidate," the Oklahoma statute was valid.). Furthermore, this Court need only address Louisiana's restrictions on political activity with regards to partisan politics as opposed to non-partisan political activity.[7]

Since there is no dispute here as to the constitutionality of §2504 itself, the Court must address the issue of whether Chief Congemi constitutionally applied this statute to the plaintiffs. As the Court has indicated, if Congemi violated no constitutional right, then the plaintiffs can maintain no §1983 claims against him. The plaintiffs argue that they were merely executive board members of PACK, and that PACK as an association (or union) decided to endorse and contribute to Stagni. The plaintiffs maintain that this activity does not fall under the prohibitions of §2504. The defendants dispute the fact that the plaintiffs were executive board members of PACK, but submit that whether they were board members or not, the plaintiffs' activities violated §2504. The activity proscribed by §2504 is such "direct and indirect" political activity by employees of the classified service. The defendants urge that the political activity undertaken by the plaintiffs did in fact constitute activity proscribed by §2504.

In *Letter Carriers,* the Supreme Court upheld, among other things, the Hatch Act prohibition on political activity by indirection by certain civil servants. In the appendix to its

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[7] The activity of the plaintiffs were at all times related to the election of candidate Stagni, who was running in a partisan election. This Court would have to employ a different analysis if the plaintiffs had been cited for engaging in non-partisan political activity. *See Wachsman v. City of Dallas*, 704 F.2d 160 (5th Cir. 1983).

opinion, the Supreme Court acknowledged the validity of the following legislation:

> 12. Activity by indirection: Any political activity which is prohibited in the case of an employee acting independently is also prohibited in the case of an employee acting in open or secret cooperation with others. Whatever the employee may not do directly or personally, he may not do indirectly or through an agent, officer, or employee chosen by him or subject to his control. Employees are therefore accountable for political activity by persons other than themselves, including wives or husbands, if, in fact, the employees are thus accomplishing by collusion and indirection what they may not lawfully do directly and openly. Political activity in fact, regardless of the methods or means used by the employee, constitutes the violation....
>
> 16. Clubs and organizations: Employees may be members of political clubs, but it is improper for them to be active in organizing such a club, to be officers of the club, or members or officers of any of its committees or to act as such, or to address a political club. Service as a delegate from such a club to a league of political clubs is service as an officer or representative of a political club and is prohibited, as is service as a delegate or representative of such a club to or in any other organization. In other words, an employee may become a member of a political club, but may not take an active part in its management or affairs, and may not represent other members or attempt to influence them by his actions or utterances....

Letter Carriers, 413 U.S. at 581, 583, 93 S.Ct. at 2898-2899 (citing the United States Civil Service Commission Form 1236,

Political Activity and Assessments, September 1939, as inserted into the Congressional Record by Senator Hatch, 86 Cong.Rec. 2938-2940).[8] The language in Section 12 above mirrors that contained in the warning sheet issued by Louisiana's State Examiner and in the opinions of Louisiana's Attorney General. *See* Doc. #14, p.9, n.5. Further case law dealing with our issue of whether the plaintiffs could do indirectly that which they cannot do directly sets is as follows:

> One further problem deserves our attention before we address the restrictions on contributions. The district court's invalidation of section 16(b)(1) regarding endorsements presented at nonpolitical gatherings applied only to individual employees, and not to their organizations. The Committee asserts that this ruling ignores its first amendment rights. These rights are derived from the individual members' associational and speech rights...and from the public's right to free and uninhibited comment on political issues....Although the district court failed to state why it reached different conclusions regarding Wachsman and the Committee, we perceive an appropriate distinction that justifies its order.
>
> The Committee must act through a spokesman. Regarding individual employees, the court was obviously concerned with limiting an employee's right to endorse a candidate at a private and/or nonpolitical gathering (e.g., a Kiwanis Club meeting

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[8] The court in *Wachsman v. City of Dallas*, 704 F.2d 160, 171 (5th Cir. 1983) states that "[v]irtually all the numerous restrictions on federal employee political activity upheld in *Letter Carriers* . . . apply as much to strictly state and local elections and political affairs as to elections for federal office and political activities attendant thereto." *See also Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

> or a neighborhood barbecue). Such a setting suggests a public employee acting as a private citizen. *This suggestion, however, does not fit a situation in which an official spokesman for an organization of city employees announces in that capacity the organization's endorsement of a particular city council candidate. The latter carriers with it all the pernicious possibilities inherent in allowing individual employees to so address political gatherings.* The arrival of an official spokesman bearing such an endorsement largely imbues a gathering with a political flavor. *Indeed, the appellant Committee here is the avowedly political arm of the city employee police and firefighters organizations. Thus, the City's interests in prohibiting endorsements will be present in any situation in which an organization of city employees desires to make an endorsement.* Therefore, the trial court's order in this regard is affirmed.

Wachsman v. City of Dallas, 704 F.2d 160, 172-173 (5th Cir. 1983) (citations omitted) (footnote omitted) (emphasis added). While §2504 has not been specifically interpreted by the courts, the meaning of that statute should closely follow the interpretations of the statues in *Letter Carriers, Broadrick*, and *Wachsman.*

This Court does not need to determine precisely what "indirect political activity" as mentioned in §2504 should encompass. This Court need only determine if the actions of the plaintiffs properly fall within the ambits of that section, because if they do, then Chief Congemi was mandated by Louisiana law to terminate the plaintiffs. This Court concludes that the plaintiffs have raised no genuine issue of material fact which would preclude a finding by this Court that there actions did not fall within the proscribed political activity of §2504. While

the plaintiffs do have rights under the United States Constitution, including the rights to equal protection, due process, the right of association, and the right to free speech, the plaintiffs do not have absolute rights to be police officers for the City of Kenner. The provisions of §2504 proscribe certain political activity undertaken "directly or indirectly." The endorsement of and subsequent monetary contribution to candidate Stagni by PACK, an association (or union) of Kenner police officers, which was controlled by the five plaintiffs in this case, amounted to at least indirect political activity as referenced by the Louisiana statute. As the Court stated earlier, the inquiry here is not whether §2504 is unconstitutional, but whether Chief Congemi properly applied that unconstitutional statute to the plaintiffs. The Court finds that Chief Congemi did properly comply with the statute.

Even if this Court was to find that Chief Congemi did not properly apply §2504 in this case, thereby violating certain constitutional rights of the plaintiffs, the Court would still be compelled to find that Chief Congemi is protected by the doctrine of qualified immunity. The final step in a determination of qualified immunity is whether the constitutional right asserted by the plaintiff to have been violated by the defendant was "clearly established" at the time the defendant acted. *See Harlow v. Fitzgerald*, 457 U.S. at 818, 102 S.Ct. at 2738 ("[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").[9] If the Court were to find that the activity of the plaintiffs was not within the

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[9] The Court notes that §2504 does not vest discretion with Chief Congemi, but mandates termination of the plaintiffs if they are found to be in violation of the statute.

contemplation of §2504, and that Chief Congemi violated the constitutional rights of the plaintiffs when he terminated them, this Court would still be compelled to find that such constitutional rights (in this context) were not "clearly established statutory or constitutional rights of which a reasonable person would have known."[10] *Id.* Therefore, the plaintiffs can maintain no claims against Chief Congemi under §1983. Accordingly, summary judgment is granted in favor of Chief Congemi with regard to the plaintiffs' §1983 charges.

C. *§1983 and Municipal Liability*

In any case alleging municipal liability under §1983, the plaintiff must be able to prove a direct casual link between a policy, practice or custom of the municipality being sued, and the alleged constitutional violation. *See City of Canton Ohio v. Harris*, 489 U.S. 378, 384, 109 S.Ct. 1197, 1203 (1989). A mere showing of a constitutional violation by a municipal employee is insufficient for municipal liability, for there is no *respondeat superior* liability for §1983 violations. *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658, 98 S.Ct. 2018 (1978). To prove municipal liability, plaintiff must prove that the municipality was itself the "moving force" behind the constitutional violation by the employee. *See Kentucky v. Graham*, 473 U.S. 159, 166, 105 S.Ct. 3099, 3105 (1985). This is because "the touchstone of the §1983 action against the government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution...." *Monell*, 436 U.S. at 690, 98 S.Ct. at 2036.

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[10] The assertions of the plaintiffs that Chief Congemi had improper motives in his treatment of the plaintiffs do not affect this Court's analysis here. *See Davis v. Scherer*, 468 U.S. 183, 191, 104 S.Ct. 3012, 3017 (1984) ("*Harlow v. Fitzgerald*...rejected the inquiry into state of mind in favor of a wholly objective standard.").

However, the Court's analysis as to the liability of the City of Kenner must flow from the findings of this Court above as to the liability of Chief Congemi, where this Court determined that there was no constitutional violation in Chief Congemi's application of the mandates of §2504. The Fifth Circuit has long recognized that simply following the mandatory dictates of state law cannot form a predicate for *Monell* liability. This point was explained in *Bigford v. Taylor*, 834 F.2d 1213, 1222 (5th Cir. 1988), when the Fifth Circuit stated that a county official's "deliberate or mistaken departure from controlling law" cannot be said to represent county policy. *See also Bethesda Lutheran Homes and Svcs. Inc. v. Leean*, 154 F.3d 716, 718-719 (7th Cir. 1998) ("But the state of mind of local officials who enforce or comply with state or federal regulations is immaterial to whether the local government is violating the Constitution if the local officials could not act otherwise without violating state or federal law. The spirit, the mindset, the joy or grief of local officials has no consequences for the plaintiffs if these officials have no discretion that they could exercise in the plaintiffs' favor. '[M]unicipal liability under §1983 attaches where--and only where--a deliberate choice to follow a course of action is made from among various alternatives.'") (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) (plurality opinion)) (other citation omitted).

The Court finds that the plaintiffs have failed to introduce genuine issues of material fact that would lead a fact finder to conclude that the City of Kenner should be held liable under the *Monell* doctrine. Chief Congemi was enforcing a constitutional Louisiana state statute, the terms of which mandate termination in the situation at issue. Once it was found that the actions of the plaintiff fell under the definition of proscribed "direct or indirect" political activity, then the plaintiffs' §1983 claims against the City of Kenner must

necessarily fail. Therefore, summary judgment should be entered in favor of the City of Kenner with regard to the plaintiffs' §1983 claims.

D. *The Plaintiffs' State Law Claims*

Under 28 U.S.C. §1367(c)(3), when federal law claims that serve as the basis of subject matter jurisdiction are dismissed, and only state law claims based on supplemental jurisdiction remain, a district court has broad discretion to remand the state law claims. *See* 28 U.S.C. §1367(c)(3) ("The district courts may decline to exercise supplemental jurisdiction...if the district court has dismissed all claims over which it has original jurisdiction."); *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988); *see also Brown v. Southwestern Bell Telephone Co.*, 901 F.2d 1250, 1254 (5th Cir. 1990) ("[T]he decision as to whether to retain the pendent claims is within the sound discretion of the district court.").

The Court, having dismissed the federal law claims of the plaintiffs, hereby declines to exercise supplemental jurisdiction and remands all pending state law claims in this matter back to state court.

Accordingly,

IT IS ORDERED that the motion of the defendants, Chief Congemi and the City of Kenner, for summary judgment with regard to the plaintiffs' federal §1983 claims are **GRANTED.**

IT IS FURTHER ORDERED that the motion of the defendants for summary judgment as to all pending state law claims is **DENIED.** The remaining state law claims are **REMANDED** back to Louisiana state court.

IT IS FURTHER ORDERED that the plaintiffs' cross motion for summary judgment is **DENIED.**

New Orleans, Louisiana, this 23rd day of November, 1998.

/s/ G. Thomas Porteous Jr.
G. THOMAS PORTEOUS, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 98-1654
SECTION "T" (2)

WEST, ET AL

VERSUS

CONGEMI

Filed: November 23, 1998
Date of Entry: November 24, 1998

JUDGMENT

The Court having granted the Motion of defendants, Nick Congemi and the City of Kenner, for Summary Judgment against the plaintiffs, Westley West, Dennis Lynch, Robert Polito, Henry Jaume, and Bruce Verrette, in the above captioned case, it is the decision of this Court that judgment be entered in favor of the defendants.

Accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Nick Congemi and the City of Kenner, for Summary Judgment and against the plaintiffs, Westley West, Dennis Lynch, Robert Polito, Henry Jaume, and Bruce Verrette, dismissing all federal claims, **WITH PREJUDICE,** and that all state law claims previously

pending before this Court are **REMANDED** back to state court.

New Orleans, Louisiana this 23rd day of November, 1998.

/s/ G. Thomas Porteous Jr.
G. THOMAS PORTEOUS, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-30258

WESTLY WEST; DENNIS LYNCH; ROBERT POLITO; HENRY JAUME; BRUCE VERRETTE,

Plaintiffs-Appellants,

v.

NICK A. CONGEMI, Chief of Police; CITY OF KENNER,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana, New Orleans

Filed: May 15, 2000

ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Opinion 3/21/00, 5 Cir., _____, _____ F.3d _____)

Before JONES, DUHE, and WIENER, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

REHG-4A

CLERK'S NOTE
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX I

LOUISIANA STATUTES

LOUISIANA REVISED STATUES
TITLE 33. MUNICIPALITIES AND PARISHES
CHAPTER 5. CIVIL SERVICE
PART II. FIRE AND POLICE CIVIL SERVICE LAW FOR MUNICIPALITIES BETWEEN 13,000 AND 250,000

La. R.S. 33:2504 (2000)

2504. Political activities prohibited

A. Political activities by and extending to employees of the classified service are hereby prohibited as follows:

(1) No person shall seek or attempt to use any political endorsement in connection with any appointment to a position in the classified service.

(2) No person shall use or promise to use, directly or indirectly, any official authority or influence, whether possessed or anticipated, to secure or attempt to secure for any person an appointment or advantage in appointment to a position in the classified service, or an increase in pay or other advantage in employment in any such position, for the purpose of influencing the vote or political action of any person, or for any consideration.

(3) No employee in the classified service shall, directly or indirectly, pay, or promise to pay, any assessment, subscription, or contribution for any political organization or purpose, or solicit or take part in soliciting any such assessment, subscription, or contribution. No person shall solicit any such assessment, subscription, or contribution of any employee in classified service. The prohibitions of this Sub-section shall not be construed as applying to membership dues paid, or

contributions made, to non-political employee organizations, pension funds, civic enterprises, the Louisiana Civil Service League or any similar non-political and non-partisan organization.

(4) No employee in the classified service shall (a) be a member of any national, state, or local committee of a political party, (b) be an officer or member of a committee of any factional, political club or organization, (c) be a candidate for nomination or election to public office, (d) make any political speech or public political statement in behalf of any candidate seeking to be elected to public office, or (e) take any part in the management or affairs of any political party or in the political campaign of any candidate for public office, except to privately express his opinion and to cast his vote.

(5) No person elected to public office shall, while serving in the elective office, be appointed to or hold any position in the classified service.

(6) No appointing authority, or agent or deputy thereof, shall directly or indirectly, demote, suspend, discharge, or otherwise discipline, or threaten to demote, suspend, discharge or otherwise discipline, or discriminate against any person in the classified service for the purpose of influencing his vote, support, or other political activity in any election or primary election. No appointing authority, or agent or deputy thereof, shall use his official authority or influence, by threats, promises or other means, directly or indirectly, to coerce the political action of any employee in the classified service.

B. The appointing authority shall discharge from the service any employee whom he deems guilty of violating any one or more of the provisions of this Section. The board may, upon its own initiative, investigate any officer or employee in the classified service whom it reasonably believes guilty of violating any one or more of the provisions. Any citizen,

taxpayer, municipal officer, or employee may file with the board detailed charges in writing against any employee in the classified service for violating any one or more of the provisions of this Section. The board shall, within thirty days after receiving the written charges, hold a public hearing and investigation and determine whether such charges are true and correct. If the board should find upon its investigation of any employee that he has violated any of the foregoing provisions, the board shall order the appointing authority to forthwith discharge the guilty employee from the service and the appointing authority shall forthwith discharge the employee.

C. Whoever violates this Section shall be subject to the penalties provided in R.S. 33:2507. In addition any employee in the classified service who is discharged because of violating a foregoing provision shall not again be eligible for employment or public office in the classified service for a period of six years from the time of his discharge.

APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 98-1654
SECTION "T"

MAGISTRATE 2

WESTLEY WEST; DENNIS LYNCH, ROBERT POLITO, HENRY JAUME, and BRUCE VERRETTE

VERSUS

NICK A. CONGEMI, CHIEF OF POLICE

STATEMENT OF MATERIAL FACTS

NOW INTO COURT through undersigned counsel come Defendants/Movers, Chief of Police Nick Congemi and the City of Kenner, who submits that the following facts, and no others, are material to their Motion for Summary Judgment, and that there are no genuine disputes as to these facts:

1) Each of the Plaintiffs were members of the classified Civil Service of the City of Kenner Police Department during their employment with that department. Civil Service in Kenner is governed by Part II of Louisiana's Civil Service law, that being La. R.S. 33:2471 et seq.

2) Plaintiff's activities, at all material times herein, were subject to the prohibitions contained in La.R.S. 33:2504. Said statute was originally enacted in 1944, and represents Louisiana's "Little Hatch Act."

3) On February 28, 1978, Louisiana's Attorney General rendered a formal Attorney General Opinion, bearing number 78-126, wherein he provided his official opinion as to "whether the Slidell Police Union,[1] whose members are classified employees under the Slidell Fire and Police Civil Service, may endorse candidates for Slidell municipal offices. Citing La. R.S. 33:2504, Louisiana's Attorney General provided the following response:

> In our opinion, if the Slidell Police Union endorses political candidates, it is no longer a non-political employee organization, but rather a political club or organization. Classified members of the Slidell Police Civil Service would be prohibited from being a member of such an organization and would be prohibited from paying dues to it.

R.S. 33:2504(B) provides in pertinent part:

> The appointing authority shall discharge from the service any employee whom he deems guilty of violating any one or more of the provisions of this section. (Exhibit 3)

4) By letter dated February 23, 1998, Joseph "Joe" Stagni, requested the endorsement of PACK for his candidacy for Division "A" Counsel at Large for the City of Kenner. A Copy of Mr. Stagni's letter was attached to the Plaintiffs' Petition as Exhibit A. (Plaintiffs' Petition, Paragraph III)

5) On or about March 3, 1998, the letter attached as Exhibit B to the Plaintiffs' Petition was distributed to other Kenner Civil Service Employees. Each Plaintiff signed the letter which states:

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[1] Slidell, like Kenner, is governed by Part II of the Louisiana Civil Service law. Only the City of New Orleans is governed by Part I.

> At this the [sic] time we, the Executive Board of the Police Association City of Kenner (PACK), have decided to endorse and support Mr. Stagni in his endeavor to seek political office. (Plaintiffs' Petition, Exhibit B)

6) On March 13, 1998, the Plaintiffs met as "the Executive Board of PACK." In that meeting, each Plaintiff personally voted ("5-0") to give Mr. Stagni a campaign contribution from PACK funds:

> *Discussion by the board:* on the amount of the donation to Dr. Stagni. A motion made by Polito second by Lynch, to donate $300.00 to Dr. Stagni. This amount should cover the cost of a newspaper article, which would give P.A.C.K. some exposure. The motion carried 5-0.

7) On March 14, 1998, the Plaintiffs provided a formal letter of endorsement to Mr. Stagni.

8) On March 30, 1998, the Plaintiffs did provide a $300 campaign contribution to Mr. Stagni.

9) On May 4, 1998, Chief Congemi directed his internal affairs division to commence a formal investigation under normal Civil Service Rules "towards possible disciplinary action, demotion or dismissal." (Exhibit 18) During this investigation, all provisions of "Louisiana's Police Officers' Bill of Rights" were fully respected.

10) On May 7, 1998, recorded statements were taken from each Plaintiff by the Kenner Police Department Internal Affairs Division. No information was obtained during any of those statements which contradicted any of the facts being set forth in this chronology. (Exhibit 1)

11) On June 1, 1998, Chief Congemi provided advance written notice to each of the Plaintiffs that a pre-termination hearing would be conducted on Thursday, June 4, 1998. (Exhibit 24)

12) On June 4, 1998, Chief Congemi did conduct a pre-termination hearing.

13) On June 15, 1998, and in compliance with the direct command of the Louisiana Legislature found at La.R.S. 33:2504(B), Chief Congemi terminated each of the five Plaintiffs. This decision was predicated upon Chief Congemi's review of each of the documents provided to this Court as Exhibits 2-24.

14) Each Plaintiff has timely appealed their termination to the Kenner Civil Service Board. Due to scheduling conflicts, those hearings have not as yet been completed, and no decision has yet been made.

Respectfully submitted,

NIELSEN LAW FIRM

/s/ Gerald J. Nielsen

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WESTLEY WEST, ET AL.	CIVIL ACTION
VERSUS	NO. 98-1654
NICK A. CONGEMI,	SECTION "T" (2)
CHIEF OF POLICE	

****

PLAINTIFFS' STATEMENT OF UNDISPUTED FACTS

The plaintiffs, Westley West, Dennis Lynch, Robert Polito, Henry Jaume, and Bruce Verrette, by counsel, submit the following undisputed material facts in support of their Cross Motion for Summary Judgment.

In response to the Defendant's Statement of Material Facts, the plaintiffs agree that paragraphs 1, 2, 4, 5, 9, 11, 12, and 14 are undisputed.

Paragraph 3 restates an Attorney General letter and statute, both of which speak for themselves. It is disputed that the Attorney General's opinion is consistent with law.

Paragraph 6 is disputed to the extent that it states that each plaintiff "personally" voted. As the minutes themselves reflect, the plaintiffs voted in their capacities as Union officials and Executive Board members. Their votes were not undertaken for any individual or personal purpose. See, Defendant's Exhibit 26; Affidavit of Westley West (hereafter "West.Aff").

Paragraph 7 is disputed to the extent that it states the plaintiffs provided an endorsement letter to Mr. Stagni. As is evidenced by the letter itself, the Union, Police Association City of Kenner, International Union of Police Associations,

Local 8195, AFL-CIO ("PACK, Local 8195"), and not any individuals, provided a formal letter of endorsement to Mr. Stagni on or about March 14, 1998. See, Defendant's Exhibit 12; West.Aff.

Paragraph 8 is disputed to the extent that it states the plaintiffs provided any contribution. The check itself and the minutes of the Union meeting, clearly reflect that the Union, PACK, Local 8195, and not any individuals, provided a $300 campaign contribution to Mr. Stagni on or about March 30, 1998. See, Defendant's Exhibit 13; West.Aff.

Paragraph 10 is disputed to the extent that it states "No information was obtained during any of those statements which contradicted any of the facts being set forth in this chronology." This statement is not disputed if modified by this Statement of Plaintiffs' Undisputed Facts.

Paragraph 13 is hotly disputed as it is the crux of the case. On June 15, 1998, Chief Congemi terminated each of the five plaintiffs for their exercising their right to associate and for their active participation in PACK, Local 8195. PACK, Local 8195 engaged in protected political speech when it endorsed Candidate Stagni and contributed to his campaign. The Executive Board members engaged in protected association when they actively participated in the Union's activities. No Louisiana statute or interpretation of the U.S. Constitution permits, much less "commands" termination in such circumstances.

1. The officers were each police officers in the Kenner Police Department who were performing at least satisfactorily, if not exemplary, at the relevant times to this action.

2. The five plaintiff officers were also actively involved in PACK, Local 8195, the Police Association Union

representing police in Kenner. They comprised the Executive Board of the Union.

3. Chief Nick A. Congemi was, at all relevant times, the Chief of Police of the Kenner Police Department and was the official with the final authority regarding policy and employment matters within the Police Department.

4. On or about February 23, 1998, Joseph Stagni, candidate for Councilman-at-Large for the City of Kenner, wrote to the Union and asked PACK, Local 8195 to endorse him. See, Defendant's Exhibit 9.

5. On or about March 3, 1998, PACK, Local 8195 polled its membership to determine whether the Union should endorse Candidate Stagni, or if there was any significant opposition thereto. See, Defendant's Exhibit 10.

6. On or about March 10, 1998, Chief Congemi sent an intimidating letter to all members of the Union. See, Exhibit C.

7. In the letter, after questioning internal union procedures, Chief Congemi then expresses concern that the Union might endorse a particular candidate without interviewing Candidate McCarthy, the Chief's preferred candidate.

8. Chief Congemi also threatened "The PACK Executive Board members will obviously answer for their actions in the near future." Chief Congemi then refuted the factual statements Candidate Stagni made in support of PACK, Local 8195's endorsement.

9. In the letter, Chief Congemi next endorses Candidate McCarthy, calling him "a true friend of every police employee" and emphasizing that he is responsible for their high salaries.

10. The Chief then contends that PACK, Local 8195's endorsement of Stagni will "plung[e] this department into political chaos. The backlash can impact you and your families for years to come."

11. He then advises the members of the association that if they tell the Executive Board that the members do not want to be involved in politics, "then PACK leaders, Westley West, Dennis Lynch, Robert Polito, Henry Jaume, and Bruce Verrette must answer for their political activities."

12. Finally, he tells the union members to forward a copy of their opposition to PACK, Local 8195 to his office so their boss, the Chief of Police "will know how you truly feel about this important issue."

13. Chief Congemi concludes the letter advising his subordinates that they should not allow the union "to destroy your future as a Kenner police officer."

14. The Executive Board received three letters of opposition, each of these mimicked or referenced Chief Congemi's letter. West.Aff.

15. The Executive Board then met to vote on the endorsement. Prior to voting, PACK, Local 8195 obtained advice from its counsel as to whether the union could endorse a political candidate. The Union was advised by several attorneys that it could engage in such Constitutionally protected political speech. See, Defendant's Exhibit 26.

16. The Union then voted to endorse Candidate Stagni and provide him with a contribution. See, Defendant's Exhibit 26; West.Aff.

17. None of the plaintiffs ever provided Candidate Stagni with a contribution in their personal or individual capacities or in their official police capacities.

18. The contribution to Candidate Stagni was written on PACK, Local 8195's checks' and came from its general treasury. None of the plaintiffs provided PACK, Local 8195 with funds so that it could forward those funds to Candidate Stagni. See, Defendant's Exhibit 13; West.Aff.

19. On or about March 14, 1998, PACK, Local 8195 wrote to Candidate Stagni providing him with the endorsement. See, Defendant's Exhibit 12.

20. None of the plaintiffs ever endorsed Candidate Stagni in their personal or individual capacities or in their official police capacities. See, West.Aff.

21. No public announcement of PACK, Local 8195's endorsement of Candidate Stagni was made by the union. Candidate Stagni listed PACK, along with other unions such as the AFL-CIO (to which PACK is affiliated), the Kenner Fire Fighter Association, the Jefferson Federation of Teachers, and other organizations as supporting him in or about April, 1998. None of the Executive Board members were named. See, Defendant's Exhibit 15; West.Aff.

22. On June 15, 1998, after conducting an internal affairs investigation, Chief Congemi carried through on his promise that the PACK, Local 8195's Executive Board members would answer for their actions and terminated all five officers.

23. On June 16, 1998, this Court refused the officers' bid for a temporary emergency injunction to allow them to continue working until the conclusion of their Civil Service Hearing.

24. The Civil Service Hearing remains ongoing.

25. Chief Congemi has since 1995 been attempting to change the Civil Service System which efforts have been opposed by PACK.

26. Chief Congemi has on various occasions referred to plaintiff Robert Polito and the entire Executive Board of PACK as "stupid."

27. Chief Congemi has on prior occasions instructed his staff officers to encourage other police officers to quit the union so that the union will fall apart.

28. Chief Congemi has in the past stated that he wanted to get rid of PACK because they were in his way.

29. Chief Congemi has specifically requested that certain officers maintain their membership in PACK so that they could act as spies for him.

Respectfully submitted,

/s/ Keith Credo
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Metairie, Louisiana 70002
Telephone: (504) 456-2742
ATTORNEY FOR PLAINTIFFS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WESTLEY WEST, DENNIS LYNCH, ROBERT POLITO, HENRY JAUME, and BRUCE VERRETTE	CIVIL ACTION NO.98-1654 SECTION "T"
VERSUS	
NICK A. CONGEMI, CHIEF OF POLICE	MAGISTRATE 2

DEFENDANTS RESPONSE TO PLAINTIFFS' STATEMENT OF UNCONTESTED FACTS

NOW INTO COURT through undersigned counsel come Defendants, Chief Nick Congemi (sued individually) and the City of Kenner, who submit the following response to the Plaintiffs' Statement of Undisputed Facts.

First, Defendants note that Plaintiffs did not actually *dispute* any of the facts which are material to the Defendants' Motion for Summary Judgment. For instance, item 6 of Defendants' Statement of Undisputed Facts is questioned solely because of the use of the word "personally." Plaintiffs misconstrued the use of the word. The word "personally" was used solely to emphasize that each of the five Plaintiffs did vote. They thus did "take part." The word was not used in the sense claimed by the Plaintiffs, that being in a particular "capacity." La.R.S. 33:2504 does not talk about capacity. It talks about "direct or indirect" action. Thus, while Plaintiffs *quibble* as to material facts, they do not actually place any given fact in contest such that a jury would have to choose between a given fact "A", as opposed to a given fact "B". Thus,

there is no "genuine" dispute as to any "material" fact concerning Defendants' motion, before the Court.

Second, Defendants submit the following response with regard to each of the items contained in Plaintiffs' Statement of Undisputed Facts, which presumably were presented with reference to the *Plaintiff's* Motion.[1] **Note, the following facts are *not* material to the *Defendants'* Motion:**

1. This is not "material" to any issue before the court.

2. Disputed, for two reasons: First, two of the Plaintiffs previously swore under oath in a prior state court proceeding that PACK was *not* a union (Ex. B) Second, pages ten through fifteen of Exhibit A show that the Plaintiffs are not the executive officers of anything.

3. Disputed. La.R.S. 33:2504 constitutes the policy of the state of Louisiana, and not Kenner. Chief Congemi cannot make policy for Kenner with respect to state law. As such he is not the policymaker for the City of Kenner on this particular issue. When, as here, the municipal official's discretion is constrained by state law, "his deliberate or mistaken departure from the controlling law" cannot be said to represent county [a/k/a municipal] policy." *Bigford v. Taylor* 834 F.2d 1213, 1222 (5th Cir. 1988) (Rubin, Author)

4. Disputed only to the extent that there is no reference to either "the union" or "local 8195" in the letter at issue, which is found at Defendants' Exhibit 9.

5. Immaterial, and disputed. Plaintiffs have never explained why polling is material to any issue under La.R.S. 33:2504. (Defendants' *challenge* Plaintiffs to explain how polling is "material" to any issue before the Court.) In any

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[1] Any exhibits referenced herein are attached to the memorandum contemporaneously filed by Defendants with this pleading.

event, it is disputed that any polling occurred in accordance with PACK's By-Laws. The Plaintiffs' March 3, 1998 letter does nothing beyond ask for written objections. This is *not* the manner in which the By-Laws of this organization require that votes of the membership are to be taken. Accordingly, even if these people are PACK officers as they claim, they certainly didn't follow their organization's rules and regulations as to how votes on issues are to be handled.

6. Immaterial, and disputed. Chief Congemi's actions are not relevant or material to any aspect of whether Plaintiffs violated §2504. Moreover, the Chief's letter is no more "intimidating" than the various warning letters sent out by the State Examiner and/or the opinion letters of the Attorney General. Also, PACK, according to Exhibit B, is not a Union.

7. - 13. Each of these averments are immaterial and disputed. They are immaterial because Chief Congemi's letter does not somehow give Plaintiffs a "free pass" to violate §2504. They are disputed to the extent that Plaintiffs' paraphrase Chief Congemi's letter at length. It is a short document, and can be read by the Court.

14. Immaterial, and disputed. Like the issue of polling, nothing in §2504 makes opposition from the membership relevant. The fact is also disputed, in that fourteen persons signed one of the letters. As such, almost a fourth of the membership called for a vote upon the issue, but was ignored.

15. Immaterial, and disputed. Plaintiffs' claims of good faith are immaterial, for the only statute before the Court is §2504. The additional penalties of La.R.S. 33:2507, for which willfulness *is* an element, is not at issue. Additionally, Defendants must dispute what these attorneys supposedly said, for their comments are not presented to the Court in competent summary judgment evidence. All that is presented is the vague conclusion that these attorneys supported the acts in question.

If their opinions were worthy of belief, they would be worthy of direct presentation to this Honorable Court.

16. Immaterial, and disputed. §2504 prohibits both "direct and indirect" political activity. *How* these people "took part" in Mr. Stagni's campaign is not material. *Any* taking part violates the statute. Moreover, PACK's By-Laws prescribe how votes are to be taken. None of the facts presented by PACK's supposed executive Board indicates any compliance with PACK's rules. How then, could it be said that PACK voted.

17. Immaterial, and disputed. The point is immaterial, in that no where in §2504 does the statute address "capacities." It clearly bars any political support of a candidate, whether it is accomplished "directly or indirectly." In essence, the Plaintiffs tell this Court that *they did it* collectively or *they did it* in their official capacities, or *they did it* as board members. To state their argument is to *show* its weakness. Their argument can't be stated, without stating that ***they did it.***

18. Immaterial and disputed. Nothing within §2504 makes the source of funds a material issue. Additionally, the item is disputed as to the reference to "Local 8195," for the checks make no reference to a local or to a Union. See Defendants' exhibit 13.

19. Disputed with regard to the reference to "local 8195." There is no reference to a "local" on the letter.

20. Please see Defendant's response to item 17, which is incorporated herein by reference.

21. This item is disputed, for respectfully it makes no sense. The first sentence is in conflict with the second sentence. Moreover, please see item 12 of the Appendix in *CSC v. Letter Carriers* 93 S.Ct.2880, 2898 (1973). These particular Civil Service Employees placed the endorsement letter into the

political election contest, and are responsible for every use made of it by the candidate. Id.

22. The fact of an internal affairs investigation, and of the terminations, are of course, not disputed. The rhetoric as to these facts, being nothing beyond argument, are disputed.

23. Not disputed, except for the reference to "officers." As explained by documents 10-15 in Exhibit A, the Plaintiffs are not officers of anything.

24. Not disputed.

25. Immaterial and disputed. As a matter of law, as explained in the contemporaneously filed Memorandum in Opposition to Cross Motion for Summary Judgment, Chief Congemi's subjective motivations *cannot* be considered in the context of his qualified immunity based Motion for Summary Judgment. Moreover, it is unclear whether PACK opposed anything, given that the Plaintiffs were not its officers.

26. Immaterial, for the reasons noted above.

27. Immaterial. Chief Congemi's actions cannot be relied upon to create a "free pass" which would absolve the Plaintiffs of the legal consequences of violating §2504.

28. Immaterial, and disputed. Chief Congemi's subjective motivations are completely immaterial for the reasons noted above. Moreover, Chief Congemi has never made an attempt to "get rid of PACK."

29. Immaterial, and disputed. This is nothing beyond an improper attempt to try to defeat the defense of qualified immunity through immaterial and irrelevant allegations of malice and improper claims as to subjective motivations. All pertinent

Supreme Court and Fifth Circuit precedents clearly explain that all such factors are immaterial to qualified immunity analysis.

Respectfully submitted,

Nielsen Law Firm

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(504) 837-2500
Counsel for Nick A. Congemi
and the City of Kenner

CERTIFICATE

I hereby certify that a copy of the above and foregoing pleading has been served on all counsel of record by depositing same in the United States Mail, postage pre-paid and properly addressed at Metairie, Louisiana, this 27th day of October, 1998.

/s/ Gerald J. Nielsen

APPENDIX K

[SEAL]

CITY OF KENNER
1801 Williams Boulevard
Kenner, Louisiana 70062
(504) 468-7200

LOUIS J. CONGEMI
MAYOR

MEMORANDUM

DATE: February 17, 1998

TO: ALL CLASSIFIED EMPLOYEES

FROM: Frank Simoncioni, Chairman, Civil Service Board

RE: POLITICAL ACTIVITIES PROHIBITED

NOTICE

All classified employees are prohibited from political activities as stated in R.S. 33:2504. Please review attached political activities guideline.

The penalty for violation of Civil Service Law is as follows:

"R.S. 33:2507 Penalties - Whoever wilfully violates any provision of this Section or of the rules shall be fined more than five hundred dollars and shall, for a period of six years, be ineligible for appointment to employment in any position of the classified service. If he is an officer or employee of the classified service shall forfeit his office or position."

PLEASE POST THIS NOTICE FOR ALL CIVIL SERVICE EMPLOYEES

FS:jps

Attachment

cc: Police Chief Nick Congemi
Jail - Police Department
Communications - Police Department
Fire Chief Zito
All Fire Stations
Gregory G. Gremillion, Board Attorney
Beverly Nicolosi, Personnel Department

POLITICAL ACTIVITY RESTRICTED BY MUNICIPAL FIRE AND POLICE CIVIL SERVICE LAW

Warning To Classified Employees Of The Fire And Police Departments And To Members Of The Fire And Police Civil Service Boards

EMPLOYEE DEFINED

An employee, as referred to in this bulletin, is any person holding a job or position in the classified service of the Fire or Police Department by emergency, provisional, substitute, probationary, or permanent appointment. Such person is an employee and his political activity is regulated: (1) While he is on active duty or while off duty. (2) While on annual or sick leave. (3) While on educational, military, maternity, civil, emergency, or compensatory leave. (4) While on leave of absence of any type, with or without pay. (5) While off duty during a holiday. (6) While under suspension without pay.

SPECIFIC PROHIBITIONS IN THE LAW REGULATING POLITICAL ACTIVITY ON THE PART OF EMPLOYEES

Directly or indirectly paying or promising to pay any assessment, subscription or contribution for any political organization or purpose.

Soliciting or taking any part in soliciting any assessment, subscription, or contribution for any political organization or purpose.

Being a member of any national, state, or local committee of a political party.

Being an officer or member of any factional political club or organization.

Being a candidate for nomination or election to any public office.

Making any political speech or public political statement on behalf of any candidate, faction, or party as a part of any political campaign for the nomination or election of public officers.

TAKING PART IN THE MANAGEMENT OR AFFAIRS OF ANY POLITICAL PARTY OR IN THE POLITICAL CAMPAIGN OF ANY CANDIDATE FOR PUBLIC OFFICE, EXCEPT TO PRIVATELY EXPRESS HIS OPINION AND TO CAST HIS VOTE.

COERCION OR INTIMIDATION OF EMPLOYEES PROHIBITED BY THE FIRE AND POLICE CIVIL SERVICE LAW

No appointing authority or agent or deputy thereof or supervisor of any employee shall directly or indirectly demote, suspend, discharge, or otherwise discipline any person in the classified service for the purpose of influencing his vote, support, or other political activity in any election or primary election; and no appointing authority or agent or deputy thereof shall use his political authority or influence, by threats, promises, or other means, directly or indirectly, to punish or coerce the political action of any employee in the classified service.

OTHER PROHIBITIONS IN THE FIRE AND POLICE CIVIL SERVICE LAW AFFECTING PERSONS NOT NECESSARILY EMPLOYEES

No person shall be appointed or promoted to or demoted or dismissed from any position in the classified service, or in any way favored or discriminated against with respect to his political or religious opinions or affiliations.

No person shall commit or attempt to commit any fraud preventing the impartial execution of the civil service law.

No person shall solicit any assessment, subscription, or contribution of any employee in the classified service.

No person shall, directly or indirectly, give, render, pay, offer, solicit, or accept any money, service, or other valuable consideration for or on account of any appointment, proposed appointment, promotion, or proposed promotion to, or any advantage in, a position in the classified service.

PENALTIES FOR VIOLATION OF FIRE AND POLICE CIVIL SERVICE LAW

Whoever willfully violates any provision of this law or of the rules shall be fined not more than five hundred dollars and shall, for a period of six years, be ineligible for appointment to or employment in any position of the classified service. If he is an officer or employee of the classified service he shall forfeit his office or position.

SEE REVERSE SIDE FOR EXAMPLES

Do Not Remove By Order Of The Civil Service Board

COMMENT BY STATE EXAMINER

The State Examiner will not attempt to define all conduct constituting violation of the civil service law relating to prohibited political activity. It is the function of the local civil service board to determine violations. However, the State Examiner's Office continuously receives questions requesting interpretations of the political activity restrictions placed on classified employees. Some of the more frequently asked questions are listed below. For ease of reference we have divided these into two columns. Answers to the questions in the left-hand column would be "No." This type of activity would be prohibited under existing restrictions. Answers to the questions in the right-hand column would be "Yes." Such activity has not been interpreted as contrary to political activity restrictions.

NO

May I wear a badge, button, T-shirt, or other item of clothing printed as a vote solicitation for a candidate, faction, or party?

May I display a political sticker on my personal vehicle?

May I accompany a candidate door to door to solicit voter support?

May I store, distribute, or transport political literature, posters, or other political data?

May I post political signs, pictures, or ads in public places, or display them in my home, yard, office, or elsewhere?

May my photograph be used, either individually or in a group, in campaign literature or ads?

May I distribute, sell, or solicit the sale of tickets to a political function or encourage attendance at such functions?

May I purchase a ticket for a function for a political candidate or may I attend such a function if someone gives me a free ticket?

May I sign a petition to have a person's name added to a ballot for an elected public office?

May I work at campaign headquarters, address campaign literature or envelopes, plan or arrange for a political rally or meeting, act as a driver or chauffeur for a candidate in an election campaign, or otherwise assist in a campaign?

May I sponsor a political function or any type of political meeting for a candidate or party in my home?

May I solicit votes or support for a candidate or party by any means or communication?

May I contribute a vehicle or money to promote transportation of voters to the polls?

The above restrictions would still apply even if the candidate for public office is the classified employee's spouse.

YES

May I designate $1.00 on my federal income tax return to a presidential campaign?

May my spouse place political bumper stickers on his/her personal vehicle? (*Provided* you do not drive the vehicle).

May my spouse place political signs, pictures, or ads in our home, yard, or at other domiciles or places of business owned jointly by both of us?

May I be a member of an association which occasionally lobbies to get certain legislation approved? (*Provided* the legislation is not such that would support or endorse any candidate.)

May I participate as a member of a group hired to perform at a political function? (*Provided* the group's fees have not been reduced or waived for political reasons.)

May I introduce political candidates at a function at which all candidates will speak?

May I actively support a school bond issue or other non-candidate election?

May I attend a political rally that is free and open to the public?

May I sign a recall petition? (*However,* you are *prohibited* from soliciting signatures for the position.)

Please take special note of all parenthesized exceptions above.

****

The examples listed on this page are merely illustrations. They do not include all possible violations. When an employee is in doubt as to the propriety of his action he should refrain therefrom. Attention is again specifically called to the following provisions of the law: "NO EMPLOYEE IN THE CLASSIFIED SERVICE SHALL -- TAKE PART IN THE MANAGEMENT OR AFFAIRS OF ANY CANDIDATE FOR PUBLIC OFFICE, EXCEPT TO PRIVATELY EXPRESS HIS OPINION AND TO CAST HIS VOTE." Article X, Section 20 of the Constitution of the State of Louisiana and Revised Statutes 33:2504 and 33:2564.

ISSUED BY
STATE EXAMINER
MUNICIPAL FIRE AND POLICE CIVIL SERVICE
BATON ROUGE, LOUISIANA

[photo omitted] **JOE STAGNI** [photo omitted]

1700 Taylor St.
Kenner, LA 70062

February 23, 1998

P.A.C.K.

P.O. Box 641273

Kenner, LA 70064

Dear Brothers & Sisters:

I am seeking the office of Councilman At-Large Division "A" in Kenner. I have a long history with the working men and women of our state.

As a member of the LA Union of Chiropractic Physicians, I have not only fought for issues that affect my patients and my profession, I also stood with firemen and policemen when your civil service system was under attack. I worked with Jerry Bloom, M. McCoy and Billy Sanchez.

I am on record supporting working men and women of our city and state. Now, I need you to stand by me. You can be assured that your issues are my issues and together we can do a better job.

Your endorsement is very important and it will help me be a voice for you on the council. Please accept this letter as a formal request seeking the endorsement of your organization.

If your organization is inclined to endorse me, please let me know as soon as possible. My public relations person will coordinate press releases from your organization and my campaign.

If you have any questions, contact Rebecca Car at 464-1998 or 443-6220.

Thanking you for your consideration, I am

Sincerely,

/s/ Joe
Joseph "Joe" Stagni
Div. "A" Council At-Large Candidate

[Seal] [Seal]

PACK

POLICE ASSOCIATION CITY OF KENNER
ASSOCIATIONS AFL-CIO LOCAL 8195
P.O. Box 641273
Kenner, LA 70064

March 3, 1998

Dear Member,

On February 23, 1998 The Executive Board received a letter from a Kenner business man Mr. Joseph Stagni, who advised that he is seeking the office of Councilman At-Large Division "At" in Kenner.

He advised that he is a member of the LA Union of Chiropractic Physicians, and that he stood with the police and firemen when our Civil Service System was under attack, in support of preserving the system as it is today.

He is now asking for our support in his endeavor to seek the office of Councilman At-Large for Division "A" in Kenner.

At this the time we, The Executive Board of the Police Association City of Kenner (P.A.C.K.), have decided to endorse and support Mr. Stagni in his endeavor to seek political office.

However, as a member of our very strong and growing organization, you also have a voice in our decision. Therefore we are asking that if you have any objection to the decision of The Executive Board, please notify any one of us in writing by Friday March 13, 1998.

We Remain,

/s/ Westly West	/s/ Dennis Lynch	/s/ Robert Polito
Westly West	Dennis Lynch	Robert Polito
President	Vice-President	Secretary
/s/ Henry Jaume	/s/ Bruce Verrette	
Henry Jaume	Bruce Verrette	
Treasurer	Sergeant At Arms	

[Seal]

Kenner Police Department
Office Of The Chief

NICK A. CONGEMI
Chief of Police

March 10, 1998

Henry Jaume
1817 Francis Ave
Metairie, LA 70003

Dear Henry,

On March 3, 1998, the attached letter was sent to all members of the Police Association, City of Kenner (P.A.C.K.) indicating that the Executive Board of the organization consisting of Westley West, Dennis Lynch, Robert Polito, Henry Jaume, and Bruce Verrette has decided to endorse candidate Joe Stagni against incumbent Councilman-at-Large Terry McCarthy.

I am primarily concerned about how the P.A.C.K. Executive Board decided this issue without any input from you as a member!

A question that begs to be answered is how the P.A.C.K. Executive Board has unilaterally contacted Mr. Stagni, in violation of state Civil Service laws, then formulate an opinion about the candidates without interviewing Councilman McCarthy? The P.A.C.K. Executive Board members will obviously answer for their actions in the near future.

The P.A.C.K. letter stresses that Mr. Stagni, a member of the Louisiana Union of Chiropractic Physicians, "stood with the police officers and firefighters when our Civil Service system was under attack," in support of preserving the system as it is today. There is no evidence to support this claim. I have

been involved in the issue of seniority versus merit based Civil Service for years, and at no time encountered Mr. Stagni in any fashion.

This police department has grown and prospered under the present government with Councilman McCarthy at the helm. He has been a true friend of every police employee. We have enjoyed great benefits, the highest salary in Louisiana, and the finest crime fighting equipment in the world because of him. It is unconscionable how anyone can make a decision hearing from only one candidate while Councilman McCarthy has a proven track record of supporting the Kenner Police Department.

Those of short, narrow vision who sit on the P.A.C.K. Executive Board do not fully comprehend the ramifications of their actions by plunging this Department into political chaos. The backlash can impact you and your families for years to come. This Department has enjoyed great support from the Kenner City Council, which controls our budget. As such, we are dependent on the Council's support.

This Department has always been above politics as it should be because of Civil Service. Unfortunately, you cannot ignore this particular situation as it seems that the P.A.C.K. Executive Board has already made the decision for you and now gives you an ultimatum. Although the letter indicates you have a voice, it did not say you have a vote!

If you do not respond, they will feel you are supportive of their questionable actions. However, if you vote and tell them loud and clear that you do not want this organization to be involved in politics whatsoever, then P.A.C.K. leaders West, Lynch, Polito, Jaume', and Verrette must answer for their political activities.

When you do respond to the P.A.C.K. letter, please forward a copy of your response to my office so we will know how you truly feel about this important issue. Please do not allow a few perpetually disgruntled, bitter individuals to destroy your future as a Kenner police officer.

Sincerely,

/s/ Nick Congemi
Nick A. Congemi
Chief of Police

NAC/jn

[Seal] [Seal]

PACK

POLICE ASSOCIATION CITY OF KENNER
ASSOCIATIONS AFL-CIO LOCAL 8195
P.O. Box 641273
Kenner, LA 70064

MONTHLY BOARD MEETING
POLICE ASSOCIATION CITY OF KENNER

March 13, 1998

ORDER OF BUSINESS

1. Meeting called to order by President Westly West at 1730 hours.

2. Roll call of the Executive Board in attendance.

   Westly West - President Dennis Lynch - Vice-President Robert Polito - Secretary

   Henry Jaume - Treasurer Bruce Verrette - Sergeant At Arms

3. Reading of the minutes for the month of February by Polito. A motion to accept the minutes as read by Polito, was made by Lynch second by Jaume. This motion carried 5-0.

5. The financial report was dispersed by Jaume to all Board Members Present. A motion to accept the financial report dispersed by Jaume was made by Polito second by Lynch. The motion carried 5-0

Incoming Correspondences:

1. Letter from Christy Newman, expressing her desire not to be politically involved.
2. Letter of Gilbert Newman, expressing his desire not to be politically involved.
3. Letter from Billy Mouret, expressing his desire not to be politically involved, and advising the board to keep up the good work.
4. A letter from several members requesting a meeting regarding the endorsement of Joe Stagni.
5. Letter from Chief Congemi.

Outgoing Correspondences

1. Letter to the members advising of the decision of the Board to support Joe Stagni, if the Majority of the membership agreed.

Reports of Committees:

None

New Committees:

None

New Business:

1. *Discussion by West:* Regarding the letter from Chief Congemi, West instructed Jaume to check with Falcon, Daly, Desalvo, and the results were the same. That P.A.C.K. has the absolute right to endorse a candidate as an organization. In fact Falcon advised that it was Chief Congemi who is acting illegally with his letter on Kenner Police Department letterhead.
2. *Discussion by Jaume:* that he would check the post office box at midnight to make sure no other letters of objection

were received. If there were no other letters than he would type the endorsement letter.

3. *Discussion by the Board:* that only three letters of objection were received, and that Gil Newman's letter would not be accepted due to the fact that he was in arrears of his dues and not a member in good standing at the time of the vote.

4. *Discussion by the Board:* on the amount of the donation to Dr. Stagni. A motion made by Polito second by Lynch, to donate $300.00 to Dr. Stagni. This amount should cover the cost of a newspaper article, which would give P.A.C.K. some exposure. The motion carried. 5-0.

5. * * * *

6. *Discussion by West:* to join the Greater New Orleans AFL-CIO. A motion was made by West second by Jaume to join the AFL-CIO. The motion passed 5-0.

7. *Discussion by the Board:* regarding the application request for membership by Carl Lemoine The Board has decided by a 5-0 vote to deny the application of Carl Lemoine because of his public attack on P.A.C.K., and that his position with the department would be a conflict of interest. A letter will be sent.

[Seal] [Seal]

PACK

POLICE ASSOCIATION CITY OF KENNER
ASSOCIATIONS AFL-CIO LOCAL 8195
P.O. Box 641273
Kenner, LA 70064

March 14, 1998

Joseph Stagni
1700 Taylor St.,
Kenner, La 70062

RE: Endorsement

Dear Mr. Stagni:

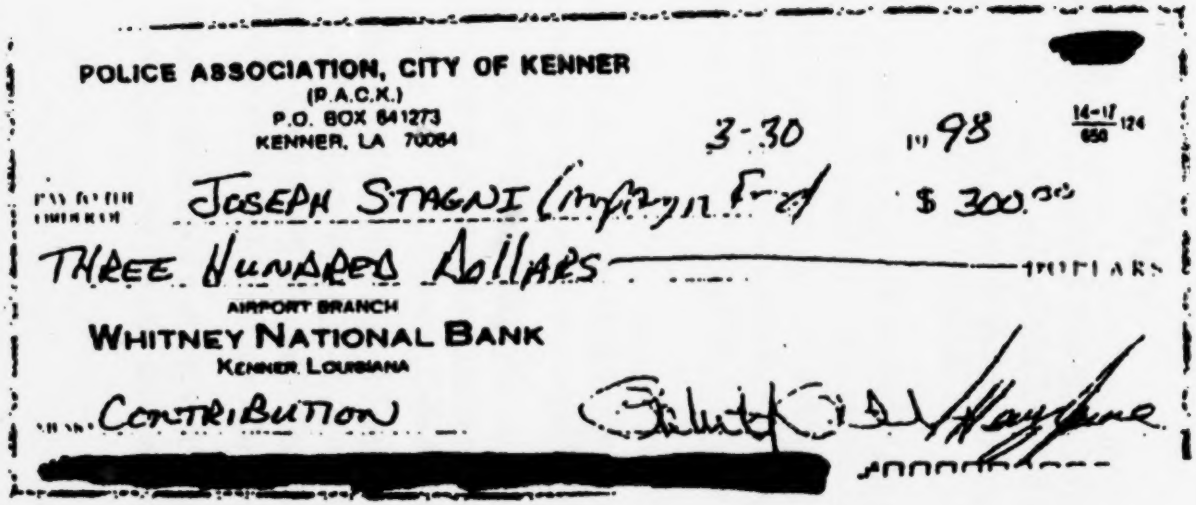
This letter is in response to your letter requesting the endorsement of our organization, the Police Association City of Kenner (P.A.C.K.).

I am pleased to advise you, that after polling the membership, the Police Association City of Kenner (P.A.C.K.), will be endorsing your candidacy for Councilman At-Large Division "A" in the City of Kenner, on April 4, 1998.

We are looking forward to a successful working relationship with you, and we wish you the best of luck in your upcoming endeavor.

Respectfully,

/s/ Westly West
Westly West
President



POLICE ASSOCIATION, CITY OF KENNER
(P.A.C.K.)
P.O. BOX 641273
KENNER, LA 70064

3-30 19 98 14-17/650 124

PAY TO THE ORDER OF JOSEPH STAGNI (Campaign Fund) $ 300.00

THREE HUNDRED Dollars DOLLARS

AIRPORT BRANCH
WHITNEY NATIONAL BANK
KENNER, LOUISIANA

FOR CONTRIBUTION

[redacted]

JOE STAGNI'S
proposal for
A BETTER KENNER

★★★★★★★★★★★★★★★★★★★★★

- ★ A strong independent civil service system for city employees
- ★ Establish an open and fair selection process for awarding "Professional Service Contracts"
- ★ Allow citizens to vote on Charter change recommendations made by a Citizen Advisory Committee
- ★ Establish a politically independent planning committee
- ★ Establish a "Rainy Day Reserve Fund" with revenue from gambling sources
- ★ Establish local initiative Charter Amendment

★★★★★★★★★★★★★★★★★★★★★

These are just some of the reasons why **JOE STAGNI,** is endorsed and supported by:

- Alliance For Good Government
- AFL-CIO
- Jefferson Federation of Teachers
- Jefferson Parish Councilman John Lavarine
- Jefferson Independent Voter Association (JIVA)
- Kenner Fire Fighter Association
- Police Association City of Kenner
- Kenner Councilman John Lavarine, III
- Louisiana Criminal Justice Commission

- Spanish American Business Association (SABA)
- Coach J.T. Curtis

[Photograph omitted in printing]

FINALLY A CHOICE --
Joe Stagni a public servant,
not a politician who serves other politicians.

Paid for by Joe Stagni Campaign

Supreme Court, U.S.
FILED
OCT 16 2000
OFFICE OF THE CLERK

(2)

No. 00-248

IN THE

Supreme Court of the United States

WESTLY WEST, *et al.*,

Petitioners,

v.

NICK A. CONGEMI, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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53pp

QUESTION PRESENTED

May a civil service employee legally engage in political activity which he agrees would be illegal under Louisiana's Constitution and Little Hatch Act, merely by associating with one or more other persons to do the exact same act? In other words, may two or more civil service employees accomplish together that which they could not do if acting alone?

PARTIES TO THE PROCEEDING BELOW

The Petition includes an interloper. The only proper Petitioners are those five individual employees who were terminated from their civil service employment by the City of Kenner Police Department. The so-called "Police Association City of Kenner" (PACK), if it exists at all, was never a proper party before the district court, or before the appellate court. These points will be explained in more detail later herein. For now, please see footnote 1 to the decision of the appellate court.

The Respondents are the City of Kenner and Chief of Police Nick Congemi. Kenner was the employer of the five former employee Petitioners. Chief of Police Nick Congemi (an elected official) is the individual official who terminated the five Petitioners' employment.

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Attachment 2 — Judgment And Reasons Of The 24th Judicial District Court For The Parish Of Jefferson, State Of Louisiana, Dated And Filed February 29, 2000 ..... 8a

CITATIONS TO OPINIONS BELOW

The decision of the district court is published at *West v. Congemi*, 28 F. Supp. 2d 385 (E.D. La. 1998), *affirmed*, 211 F.3d 593 (5th Cir. 2000). A copy of the district court's decision, as well as the unpublished decision of the United States Fifth Circuit Court of Appeals, may be found as Appendix F and G, respectively, attached to the Petition for Certiorari.

In addition, and for the purpose of respecting the intent behind this Court's Rule 15.2, Respondents respectfully apprise this Honorable Court of two additional rulings involving this matter:

First, on June 24, 1999, the City of Kenner Municipal Fire and Police Civil Service Board ruled after a lengthy hearing on the merits that Chief Congemi's decision to terminate the five employees was made in good faith and for cause. (Attachment 1) The Board also specifically ruled that the contribution was made to City Council candidate Joseph Stagni without any prior knowledge of the PACK membership. *Id.* However, because the Board perceived an ambiguity between La.R.S. §§ 33:2504 and 2507, it ordered that the employees were to be reinstated after all proceedings and appellate review were completed. *Id.*

Second, on February 29, 2000, the Louisiana Twenty-Fourth Judicial District Court (to which appeals of Civil Service Board rulings are properly lodged) ruled as follows: (a) the Board's factual determination that Chief Congemi acted in good faith and for cause was affirmed, and (b) the legal determination of reinstatement based upon a perceived ambiguity in the statutes was reversed, upon a determination of law that there is no conflict or ambiguity between the two state statutes. (Attachment 2)

At the time of the filing of this Opposition Memorandum, the Louisiana Court of Appeal for the Fifth Circuit is currently considering the employees' appeal of the said state district court

ruling. Oral argument of that appeal was conducted before the state appellate court just days ago, on October 5, 2000. While undersigned counsel cannot predict exactly when the ruling will be announced, he can apprise this Honorable Court that in most circumstances, decisions are rendered by the state appellate court within 30 to 60 days of oral argument. Thereafter, the filing of a writ to the Louisiana Supreme Court is highly likely.

BASIS FOR JURISDICTION

Respondents offer no argument against the jurisdictional claims made as to the five terminated employees. However, Respondents fail to see how the Police Association City of Kenner, again if it exists, is properly a Petitioner to this Court. The procedural circumstances attendant to this problem will be noted in the discussion of the Statement of the Case.

CONSTITUTIONAL PROVISIONS, TREATIES, ETC. INVOLVED

This section of the Petition contains a very serious omission. Louisiana's "Little Hatch Act" is not *just* statutory. Its entire text, while repeated at La.R.S. 33:2504, is also included in its entirety within Louisiana's Constitution. Accordingly, any interpretation of La.R.S. 33:2504 is likewise an interpretation of Louisiana's Constitution. In that regard, Louisiana's Constitution of 1974 at Article 10, Section 20, reads as follows:

> Section 20. **Political Activities**
>
> Section 20. Article XIV, Section 15.1, paragraph 34 of the Constitution of 1921 is retained and continued in force and effect.

The referenced paragraph from the Louisiana Constitution of 1921 reads as follows:

> **34. Political Activities Prohibited**. a. Political activities by and extending to employees of the classified service are hereby prohibited as follows:

(1) No person shall seek or attempt to use any political endorsement in connection with any appointment to a position in the classified service.

(2) No person shall use or promise to use, directly or indirectly, any official authority or influence, whether possessed or anticipated, to secure or attempt to secure for any person an appointment or advantage in appointment to a position in the classified service, or an increase in pay or other advantage in employment in any such position, for the purpose of influencing the vote or political action of any person, or for any consideration.

(3) **No employee in the classified service shall, directly or indirectly, pay, or promise to pay any assessment, subscription, or contribution for any political organization or purpose, or solicit or take part in soliciting any such assessment, subscription, or contribution.** No person shall solicit any such assessment, subscription or contribution of any employee in classified service. The prohibitions of this Subsection shall not be construed as applying to membership dues paid, or contributions made, to non-political employee organizations, pension funds, civic enterprises, the Louisiana Civil Service League or any similar non-political and non-partisan organization.

(4) **No employee in the classified service shall** (a) be a member of any national, state, or local committee of a political party, (b) be an officer or member of a committee of any factional, political club or organization, (c) be a candidate for nomination or election to public office, (d) make any political speech or public political statement in

behalf of any candidate seeking to be elected to public office, or (e) **take any part in the management or affairs of any political party or in the political campaign of any candidate for public office, except to privately express his opinion and to cast his vote.**

(5) No person elected to public office shall, while serving in the elective office, be appointed to or hold any position in the classified service.

(6) No appointing authority, or agent or deputy thereof, shall directly or indirectly, demote, suspend, discharge, or otherwise discipline, or threaten to demote, suspend, discharge or otherwise discipline, or discriminate against any person in the classified service for the purpose of influencing his vote, support, or other political activity in any election or primary election. No appointing authority, or agent, or deputy thereof, shall use his official authority or influence, by threats, promises or other means, directly or indirectly, to coerce the political action of any employee in the classified service.

b. **The appointing authority shall discharge from the service any employee whom he deems guilty of violating any one or more of the provisions of this Section.** The board may, upon its own initiative, investigate any officer or employee in the classified service whom it reasonably believes guilty of violating any one or more of the provisions of this Section. The board shall, within thirty days after receiving the written charges, hold a public hearing and investigation and determine whether such charges are true and correct. If the board should find upon its investigation of any employee that he has violated any of the foregoing provisions, the board shall order the appointing authority to

> forthwith discharge the guilty employee from the service and the appointing authority shall forthwith discharge the employee.
>
> c. Whoever violates this Section shall be subject to the penalties provided in paragraph 37. In addition any employee in the classified service who is discharged because of violating a foregoing provision shall not again be eligible for employment or public office in the classified service for a period of six years from the time of his discharge. (emphasis added)

In addition, the Petitioners have also failed to inform this Honorable Court that all of their federal claims were predicated upon 42 U.S.C. § 1983. That statute reads as follows:

> § 1983. Civil Action for Deprivation of Rights
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The following is a chronology of the material events out of which the Petition for Certiorari arises. The chronology will first set forth the events leading to the employees' termination. Next the chronology will set forth the procedural events of the ensuing litigation including the circumstances which bear upon the question of whether "PACK" is properly a Petitioner to this Honorable Court:

1) The former employees, Messrs. West, Lynch, Polito, Jaume & Verrette were each members of the Classified Civil Service of the City of Kenner Police Department. Civil Service in Kenner is governed by Part II of Louisiana's civil service law, that being La. R.S. 33:2471 *et seq*. Accordingly, the employees' activities, at all material times herein, were subject to the prohibitions contained in La.R.S. 33:2504 and Article 10, Section 20 of Louisiana's Constitution of 1974.

2) On or about February 23, 1998, Mr. Joe Stagni, then a candidate for a seat on the Kenner City Council, sought the political support of the Executive Board of PACK in his endeavor to seek the office of Councilman At-Large for Division "A" in Kenner. (Appendix to Petition, p. 69a)

3) On or before March 3, 1998, the five employees announced to the PACK membership that they had "decided to endorse and support Mr. Stagni in his endeavor to seek political office." (Appendix to Petition, p. 71a) *Each* Petitioner signed the letter. *Id*. On the same date, the said letter was distributed to other Kenner Civil Service employees.[1] Said letter requires that

---

1. As to this activity, the rules set forth in *Letter Carriers* include the following:

> 22. Newspapers — **publication of letters or articles**: A classified employee may not publish or be connected editorially or managerially with any political newspaper, and may not write for publication or publish any letter or article, signed or unsigned, in favor of or against any

(Cont'd)

if any civil service employee of the Kenner Police Department wishes to "object" to this action, he or she must do so openly and publicly (a.k.a. "in writing") by a specified date. (Appendix to Petition, p. 71a)[2].

4) As is established by the letter of March 3, 1998, the decision to endorse had already been made by the individuals at issue *before* any vote by the general membership of PACK.

5) On March 9, 1998, thirteen members of PACK wrote a letter to the PACK Executive Board objecting to the manner in which the decision to endorse Mr. Stagni was made. In that letter, the thirteen PACK members state:

> We, the undersigned, have no specific objection to the endorsement of Mr. Stagni. Rather our objection is to the endorsement process itself, **or lack thereof.**
>
> As you stated in you letter announcing the Executive Board's endorsement, PACK is a "very strong and growing organization." It is conceivable that any endorsement of any candidate by PACK could help that candidate achieve election. **A decision of such importance should not rest solely in the hands of the Executive Board.** If only one member of PACK should contest the endorsement of Mr. Stagni, or any candidate, we believe that it is incumbent of the Executive Board

---

(Cont'd)
political party, candidate, faction, or measure. **An employee who writes such a letter or article is responsible for any use that may be made of it whether or not he gives consent to such use.** (emphasis added) (See § 4 and 19) *Letter Carriers, infra*, 413 U.S. at 586 (in Appendix).

2. Thus not even the secrecy of a ballot box was respected. **Civil service was created *precisely* to avoid this type of political coercion of civil service workers.**

> to preserve the rights of that member and require a vote of the General Membership in a Special Meeting called for in the manner prescribed by the Constitution and by laws of PACK. This is the only true method of preserving the integrity of our organization and the credibility of the Executive Board. (emphasis added)

6) On March 14, 1998, the members of the executive board of PACK, speaking through their President, Mr. West, ignored the objections of the membership and unilaterally communicated their endorsement of Mr. Stagni via a letter. (Appendix to Petition, p. 79a)

7) On March 30, 1998, the PACK executive board also provided a $300 campaign **CONTRIBUTION** to the Joseph Stagni Campaign Fund. (Appendix to Petition, p. 80a) As the PACK meeting minutes for March 13, 1998 establish, *each* Petitioner voted in favor of the contribution. (Attachment to Petition, p. 78a) **There is not even a *claim* that this action was preceded by any consultation with the PACK membership!** Moreover, the Kenner Civil Service Board has specifically found that the membership had no prior knowledge of the giving of a campaign contribution. (Attachment 1)

8) Mr. Stagni did irrefutably *receive* a political endorsement from the five employees. Such was announced publicly by Mr. Stagni during the campaign, as is evidenced by the campaign materials appended to the Petition at page 81a.

9) On May 4, 1998, and acting upon advice of counsel, Chief Congemi directed his Internal Affairs Division to commence a formal investigation under normal civil service rules "towards possible disciplinary action, demotion or dismissal." In the letter announcing said investigation to the employees, they were specifically advised that they were being investigated for possible violations of "La.R.S. 33:2504." Additionally, this notification showed that all provisions of

La.R.S. 40:2531 *et seq.*, commonly known as the "police officers' bill of rights," would be fully respected.

10) On May 7, 1998, recorded statements were taken by the Kenner Police Department Internal Affairs Division from each of the named Plaintiffs. No information was obtained during any of those statement which contradicted any of the facts being set forth in this chronology. It was during these recorded statements, however, that IAD first learned of the $300 campaign **contribution**. (Counsel for the employees was present during the taking of each of these statements.)

11) On June 1, 1998, Chief Congemi provided advance written notice to each of the Petitioners that a pre-termination hearing would be conducted on Thursday, June 4, 1998. This notice was given for the specific purpose of bringing the Kenner Police Department's activities into compliance with the U.S. Fifth Circuit's holding in *Browning v. City of Odessa*, 990 F.2d 842 (5th Cir. 1993). *Browning* regards the need to conduct pre-termination hearings before public employees with property interests in their jobs are terminated.

12) On June 2, 1998, and with the obvious intent to "sidetrack"[3] the said pre-termination hearing which was specifically mandated by the U.S. Fifth Circuit, the employees sought injunctive relief and damages pursuant to 42 U.S.C. § 1983 in a lawsuit they filed in state court. Upon service of the Petition, the Defendants promptly removed the action to federal court, given that the employees' principle claim was a claim for relief under 42 U.S.C. § 1983.

13) On June 4, 1998, U.S. District Court Judge Thomas Porteous conducted a hearing in chambers concerning the question of whether a TRO would be issued. Judge Porteous declined to issue a TRO, but noted that he would reconsider the issue of a preliminary injunction *after* Chief Congemi made his final decision as to whether the employees would actually be terminated.

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3. *See Tower, infra,* 467 U.S. 914 at 923-924.

14) Later that same day, June 4, 1998, Chief Congemi did conduct the pre-termination hearing mandated by *Browning*. At this hearing, the employees provided to Chief Congemi: (1) a copy of the $300.00 contribution check, (2) a copy of the letter of endorsement, and 3) an uncertified copy of PACK's Articles of Incorporation. Beyond these documents, no additional facts were presented for Chief Congemi's consideration. Instead, the employees remained completely silent, and spoke only through their lawyer.

15) On Monday, June 15, 1998, and in compliance with the direct command of the Louisiana Legislature found at La.R.S. 33:2504B, Chief Congemi did terminate each of the five employees. For this decision by the appointing authority to be incorrect, it must be shown that *no* violation of La.R.S. 33:2504A (3) *or* (4) occurred.

16) Louisiana law has long provided a post-termination procedure which provides due process (a/k/a notice and a reasonable opportunity to be heard) regarding any claim that a termination of civil service employment was not justified. *See* La.R.S. 33:2501.

17) Within days of being terminated, each employee sought an appeal to the Kenner Civil Service Board. As noted earlier, the Civil Service Board has already *held* that Chief Congemi acted in good faith and for cause, and a district court sitting in Louisiana has held that under Louisiana state law, that given that fact finding, the only legal response is termination. (Attachments 1, 2)

In addition to the facts which are the subject *of* the litigation, Respondents ask that this Honorable Court take notice of the following chronology which regards the progress of the litigation to date. As revealed below, the individual Plaintiffs/Petitioners who claim to be the Executive Board of PACK did not seek to have PACK intervene into this litigation until after a Motion for Summary Judgment was already pending before the district judge:

6/2/98 — Petition filed

6/19/98 — Temporary Restraining Order request from Plaintiffs denied

8/14/98 — Status conference with the district judge

9/14/98 — At the said status conference of 8/14/98, this date was set with the agreement of all counsel as the deadline for the filing of Defendants' Motion for Summary Judgment. Defendants met this deadline.

9/22/98 — On this date, well after the status conference with the district judge, well after the judge had already handled injunctive proceedings, and after the deadline set for the filing of a Motion for Summary Judgment with the agreement of counsel, the same persons who claim to be the Executive Board of PACK directed the so-called organization "PACK" to intervene through a different counsel. Clearly, the only purpose of this endeavor was to cause delay.

10/16/98 — On this date, the five employees/Plaintiffs filed their own Motion for Summary Judgment. Thus, at this point, the district judge faced motions from both sides to the controversy which sought to end it in summary fashion.

10/27/98 — The district judge issued a minute entry combining the hearing date of the cross-motions for summary judgment. At the same time, he ordered that the hearing date of the Motion to Intervene filed by PACK be continued without date. Apparently, the district judge wanted to learn whether he had a case before him in the first place, before he added another party to it.

11/4/98 — Lengthy oral argument was conducted before the district judge of both sides' motions for summary judgment.

11/23/98 — The U.S. District Judge granted the Defendants' Motion for Summary Judgment, denied the Plaintiffs' Motion for Summary Judgment, and denied PACK's Motion to Intervene as moot. (Appendix to Petition at p. 11a)

6/24/99 — In wholly separate proceedings, the Kenner Municipal Fire and Police Civil Service Board ruled this date that Chief Congemi had acted in good faith and for cause when he terminated the five employees. (Attachment 1)

2/29/2000 — The Louisiana *state* district court ruled this date that the Kenner Civil Service Board fact finding that Chief Congemi acted in good faith and for cause would stand, but that the Board's legal ruling modifying the decision to terminate would be reversed. (Attachment 2)

3/21/2000 — The U.S. Fifth Circuit affirmed the decision of the U.S. District Court granting summary judgment on all of the employees' federal claims in the lawsuit out of which the Petition arises. (Appendix to Petition at p. 1a)

10/5/2000 — Oral argument was conducted before the Louisiana Court of Appeal for the Fifth Circuit concerning the employees' appeal of the state district court ruling and the Kenner Civil Service Board ruling. No ruling from the Louisiana Fifth Circuit Court of Appeal has as yet been announced.

REASONS FOR DENYING THE WRIT

1. The *Real* Argument

Perhaps the best way to understand the question presented by the Petitioners is to first consider what is *not* presented.

Critically, Petitioners are *not* contending that their actions, if done by any particular one of them acting alone, would *not* violate Louisiana's Little Hatch Act. They do not dispute that had any one of them issued the endorsement or the contribution, that Louisiana's Constitutional and statutory law would mandate their immediate termination from civil service employment.

Second, Petitioners do not argue that Louisiana's Little Hatch Act is unconstitutional. As indicated in the opinion of Judge Porteous, Petitioners stipulated at the district court level that La.R.S. 33:2504 is Constitutional under federal law.[4]

4. As noted by the District Court, "It is very important to note that the Plaintiffs do not claim that the state statute at issue is (Cont'd)

In addition, since the provision is repeated verbatim *within* Louisiana's Constitution, logically it cannot be argued that the provision *violates* the Louisiana Constitution.

Accordingly, the only argument made by these Petitioners concerns what legal consequences would flow from a decision *of more than one* civil service employee to band together to do collectively or in group, that which no particular one of them could do alone. According to your Petitioners, the Association somehow would have greater rights under the law than the rights of any of the Association's individual members.

One problem with examining this argument in this case, is that the Association itself is not a party to these proceedings. **Police Chief Nick Congemi did not terminate PACK.** In no sense was the employees' association with, or control over PACK harmed or effected in any way. Indeed, the five employees still claim to be the executive board of PACK today. Again, PACK was never a party to this case. (Please see the U.S. Fifth Circuit's opinion in this regard.)

From the perspective of Chief of Police Nick Congemi and the City of Kenner, five different civil service employees each took an active part in the election campaign of a candidate for a seat on Kenner's City Council. Each of these five employees actively participated in providing an endorsement to that candidate, and each actively participated in the giving of a contribution. Note that the irrefutable evidence establishing these facts is attached in the Appendix to the Petition for Writ of Certiorari. At page 71a of the Petitioners' Appendix, please see where the five employees state and communicate in writing that they "have decided to endorse and support Mr. Stagni in his endeavor to seek political office." Next, please see page 78a of their Appendix wherein each of the five employees voted "5-0" to provide a campaign contribution to their candidate.

(Cont'd)
unconstitutional, but claim that Chief Congemi erroneously enforced it." *West, supra*, 28 F. Supp.2d at 389.

Finally, please see page 80a of their Appendix, that being a copy of the check they provided to the "Joseph Stagni Campaign Fund." It was this active and direct participation in the campaign of Joseph Stagni which violated Louisiana's statutory and constitutional law.

From the perspective of the Respondents, this Honorable Court's decisions in *Broadrick v. Oklahoma*, 409 U.S. 1958 (1972) and *U.S. Civil Service Commission v. National Assoc. of Letter Carriers*, 413 U.S. 548 (1972) directly answer the questions posed by these Petitioners. Indeed, the appendix to *Letter Carriers* clearly establishes that the activity at issue in this case squarely falls within the rule established by this nation's Little Hatch Act, which was then followed by each of the fifty states. At paragraph 12 of the appendix in *Letter Carriers* is found the following rule:

> 12. Activity by Indirection: Any political activity which is prohibited in the case of an employee acting independently is also prohibited in the case of an employee acting in open or secret cooperation with others. Whatever the employee may not do directly or personally, he may not do indirectly or through an agent, officer, or employee chosen by him or subject to his control. Employees are therefore accountable for political activity by persons other than themselves, including wives or husbands, if, in fact, the employees are thus accomplishing by collusion and indirection what they may not lawfully do directly and openly. Political activity in fact, regardless of the methods or means used by the employee, constitutes the violation. *Letter Carriers, supra*, 413 U.S. at 581-82.

Rule 12 noted above is borne of an understanding of political realities. Obviously, if one method of accomplishing political activity is prohibited, while another is allowed, then

everyone would simply follow the allowed method. In other words, if acting alone is prohibited, but acting together in groups is permitted, then everyone will act in groups. This is all the more true since political activity accomplished in groups is always more effective than political activity by one acting alone.[5]

In closing, Petitioners are challenging settled Constitutional law. They, *as law enforcement officers*, chose to break the law, and now are seeking to contort and twist the applicable rule beyond all reason and common sense to find some way to accomplish that which the law clearly prohibits. It is prayed that this Honorable Court will not find any reason to challenge the reasonable and proper holdings of the Courts below.

2. Is this Court to Overrule Itself?

In *Letter Carriers*, this Honorable Court ruled that "Hatch Act" restrictions were "essential" to the functioning of American government:

> Such a decision on our part would no more than confirm the judgment of history, a judgment made by this country over the last century that it is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service, in that the political influence of federal employees on others and on the electoral process should be limited. *Letter Carriers, supra*, 413 U.S. at 557.

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5. This raises a troubling practical issue. Louisiana's Constitution is on the line here. Petitioners seek a ruling that any two or more persons acting in a group may legally violate the rule of Louisiana's Constitution. As it is beyond obvious that virtually every violation of the rule would always occur with two or more persons acting in concert, agreeing with the Petitioners' contentions here would render this portion of Louisiana's Constitution for all intents and purposes, a dead letter. Also, such would have been accomplished without any input from Louisiana's Attorney General since the five Petitioners contended in the Court below that they were not contesting the constitutionality of the rule.

On the same date *Letter Carriers* was announced, this Honorable Court decided the companion decision of *Broadrick v. Oklahoma, supra*, which regarded the same type restrictions as enacted by the various states.[6] In *Broadrick*, this Honorable Court began its review of one of the states' "Little Hatch Acts" as follows:

> Section 818 was enacted in 1959 when the state first established its Merit System of Personnel Administration. The section serves roughly the same function as the analogous provisions of the other forty-nine states, and is patterned on §9(a) of the Hatch Act. **Without question, a broad range of political activities and conduct is prescribed by the section.** (emphasis added) *Broadrick, supra*, 413 U.S. at 603.

In *Broadrick*, the issue presented to this Court was whether the language of the state's Little Hatch Act was "unconstitutionally vague and its prohibitions too broad in their sweep, failing to distinguish between conduct that may be prescribed and conduct that must be permitted." *Id.*, at 2913. In response, this Honorable Court held that:

> We have held today that the Hatch Act is not impermissibly vague. [case cited omitted] We have little doubt that §818 is similarly not so vague that "men of common intelligence must necessarily guess at its meaning." *Id.*, at 607.

This Court then continued by holding:

> Whatever other problems there are with §818, it is all but frivolous to suggest that the section fails to give adequate warning of what activities it prescribes or fails to set out "explicit standards" for those who must apply it. *Id.*, at 607.

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6. Following the enactment of the federal Hatch Act, *each* of the fifty states enacted their own "Little Hatch Acts." La.R.S. 33:2504 was originally enacted as Act 102 of 1944.

Louisiana's Little Hatch Act cannot be distinguished in any material way from the Oklahoma statute at issue in *Broadrick*. Notably, nowhere in the Petition for Writ of Certiorari have the Petitioners at bar contended that Louisiana's legislation bears any material difference from that approved in *Broadrick*. Indeed, based upon *Broadrick* and *Letter Carriers*, Petitioners at bar concede the constitutionality of the Louisiana rule. (Petition at pp. 7 and 20, footnote 1a)

It is indeed the rare case that this Honorable Court reverses itself. As was recently indicated by this Court in *Dickerson v. U.S.*, __ U.S. __, 120 S. Ct. 2326 (2000) the principles of *stare decisis* "weigh heavily" against overruling this Honorable Court's Constitutional decisions. *Id.*, at 2336. Both *Broadrick* and *Letter Carriers* are currently the settled rule in this country and in the fifty states. Petitioners have come nowhere near establishing a basis for overturning those settled Constitutional principles now.

3. No Conflict Exists

Petitioners' principle argument to this Honorable Court is that the U.S. Fifth Circuit's decision at bar is in conflict with the decision of the U.S. Second Circuit in *Biller v. U.S. Merit System Protection Board*, 863 F.2d 1079 (2nd Cir. 1988), and with the decision of the U.S. Eleventh Circuit in *Blaylock v. U.S. Merit System Protection Board*, 851 F.2d 1348 (11th Cir. 1988). With all respect, this argument borders on the frivolous.

In both *Biller* and *Blaylock*, the plaintiffs were contending that they did not violate the statute *at all*. Mr. Biller and Mr. Blaylock were not contending that the capacity in which they had acted (a/k/a the hat they were wearing at the time) was determinative of whether or not they had violated the rule. Quite to the contrary, the argument made by Mr. Biller and Mr. Blaylock was that they had done nothing beyond expressing their own opinions about political subjects and candidates, *and had gone no farther*. The *Biller* and *Blaylock* Courts agreed.

In contrast, your Petitioners at bar have *never* contended that their conduct would not violate the applicable rule if they had committed it acting alone. Instead, they make an argument which is unconsidered in the *Biller* and *Blaylock* cases, that being that the capacity in which they acted is somehow relevant and actually controlling.

Respondents respectfully submit that when this Honorable Court compares the contentions of the Petitioners at bar to the questions resolved in *Biller* and *Blaylock*, this Honorable Court will see that *Biller* and *Blaylock* have nothing whatsoever to do with the instant controversy. As was held by the U.S. Fifth Circuit at bar, the instant controversy is governed by this Honorable Court's decisions in *Broadrick* and *Letter Carriers*, and by the U.S. Fifth Circuit's decision in *Wachsman v. City of Dallas*, 704 F.2d 160 (5th Cir. 1983).

Similarly, please note that Petitioners at bar are also contending that the U.S. Fifth Circuit panel applied the wrong line of U.S. Fifth Circuit caselaw. They contend that instead of *Wachsman*, the Fifth Circuit panel should have based its decision upon the U.S. Fifth Circuit's decisions in *Boddie v. Columbia*, 989 F.2d 745 (5th Cir. 1993) and *Brady v. Fort Bend County, Co.*, 58 F.2d 173 (5th Cir. 1995). However, this Court respectfully must presume that the U.S. Fifth Circuit is well familiar with its own jurisprudence. The Petitioners at bar repeatedly raised the same case cites to the U.S. Fifth Circuit judges, who duly considered each of them. The U.S. Fifth Circuit, having reviewed the U.S. Supreme Court precedents, as well as *Wachsman*, *Boddie* and *Brady*, determined that *Letter Carriers* and *Wachsman* controlled. Accordingly, this Honorable Court is *not* faced with a split in the circuits, and, it is *not* faced with one circuit misapplying its own prior precedents.

4. Federal Statutory Law Has No Bearing

While the contention is scarcely briefed (if at all), there is an implicit contention in the Petition that changes in federal statutory law have some bearing on this matter. Implicitly at

least, Petitioners are contending that since the U.S. Congress has changed the federal Hatch Act restrictions, that somehow this changes the *Constitutional* rule. In reply, Respondents submit the following two points:

First, this Honorable Court in *Dickerson, supra*, flatly rejected the notion that Congress can change, through statutory law, the Constitutional rules established by this Court. As held in *Dickerson*, "Congress may not legislatively supersede our decisions interpreting and applying the Constitution." *Dickerson, supra*, 120 S. Ct. at 2332. Plainly, this Court's decisions in *Broadrick* and *Letter Carriers* announced a Constitutional rule. As such, changes by the U.S. Congress to its federal Hatch Act restrictions do not change the Constitutional rules announced in *Letter Carriers* and *Broadrick*.

Second, Respondents question whether the new federal legislation would allow all of the conduct which occurred in the matter at bar. Even the Petitioners have not contended to this Court that the new federal legislation would allow them to have engaged in all of the different actions which are at issue in this case. However, even if that were to be established, such would not be determinative because of the following point of law:

Louisiana enacted a new Constitution in 1974. This was shortly after this Honorable Court's decisions in *Broadrick* and *Letter Carriers* in 1973. Thus, upon the blessing given by this Honorable Court to Hatch Act restrictions in 1973, the people of the State of Louisiana decided in 1974 to retain those Hatch Act restrictions within their new and streamlined Constitution, when so many other provisions were being removed from what had become an enormous and unwieldy constitutional document. Thus, the judgment of the people of Louisiana on the exact subject at bar, which followed two holdings on the precise Constitutional rule from this Honorable Court just one year earlier, cannot be seen as having been repudiated by

subsequent federal statutory enactments intended by the Congress to cover *only* federal employees.

5. Changes in Other States Were Not Raised Below, and Are Immaterial

In the context of these proceedings, the Supreme Court of the United States is not a trial court. Despite this, the bottom of page 13 of the Petition for Writ of Certiorari premises itself upon heresay conversations between Petitioners' attorney and several witnesses. Obviously, Respondents OBJECT to such indefensible tactics on grounds of heresay, on grounds that nothing as to how other states conduct themselves was submitted to or passed upon by the Courts below, upon grounds of materiality and relevance, and upon grounds that nothing concerning the State of Oklahoma's practices in the record of the courts below.

From the perspective of the Respondents, this Honorable Court announced a Constitutional rule in *Broadrick* and *Letter Carriers*. As such, as long as Louisiana stays within that Constitutional rule, it need not be concerned with how other states choose to conduct their affairs on these matters. Once the Petitioners conceded that the Louisiana rule was Constitutional, all arguments concerning how other states conduct themselves (which are being raised to this Court in the first instance) became irrelevant and immaterial to any issue.

6. This Court *Required* the Fifth Circuit to Decide the Constitutional Question

Part Two of the Reasons for granting the Petition submitted by Petitioners complains that, "The Fifth Circuit displayed an unusual lack of caution in going directly to the issue of constitutionality . . ." (Petition, p. 15) This argument is borne of the drafter of the Petition's failure to understand that this case was originally filed by the Petitioners as an action arising

under 42 U.S.C. § 1983.[7] In addition, the counsel who drafted the Petition failed to consider that the original Petitioners sued Chief of Police Nick Congemi individually, thus raising the question of qualified immunity, *and* sued the City of Kenner, thus raising questions under *Monell v. Dept. of Social Svs. of the City of New York*, 436 U.S. 658 (1978). In the District Court, it was the claim of the five employees that Chief Congemi's decision to terminate them somehow violated the Constitution of the United States. Because of the claims presented, the lower courts were directly faced with a claim of unconstitutional activity taken under color of law.[8]

In actions arising under 42 U.S.C. § 1983 where the plaintiff *chooses* to sue an individual public official, and that public official then raises the issue of qualified immunity, this Honorable Court's precedents have repeatedly held that the first issue to be decided by the Court is the question of whether a Constitutional violation exists at all. *See Graham v. Connor*, 490 U.S. 386 (1989); and *Siegert v. Gilley*, 500 U.S. 226, 231-235 (1991). Thus, as per this Court's prior precedents, the U.S. Fifth Circuit in this matter properly avoided reaching a complex qualified immunity analysis by first determining whether the conduct put at issue by the Plaintiffs, if proven true, would state "a violation of a Constitutional right at all." *Id.*

Moreover, by deciding the Constitutional question first, rather than pretermitting it, the lower Courts were able to avoid a complex *Monell* argument. This is because under this

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7. Clearly, that which was ruled upon by the district judge was an action brought pursuant to 42 U.S.C. § 1983. *See West, supra,* 28 F. Supp.2d at 390.

8. If a claim of a constitutional violation was not presented, what was the basis of jurisdiction in the Court below? Similarly, if this Court faces nothing other than an issue of proper application of state law, what is its jurisdiction? In reviewing the Petitioners' many contorted arguments, this Honorable Court might find that they have argued themselves right out of this Honorable Court's jurisdiction.

Honorable Court's holding of *City of Los Angeles v. Heller*, 475 U.S. 796 (1986), there can be no liability of a municipality under 42 U.S.C. § 1983 if there is no Constitutional violation by the officer at issue.

Notably, even if the Fifth Circuit had pretermitted the Constitutional violation issue, and proceeded directly to qualified immunity (vis-a-vis Chief Congemi individually), no possible claim could be stated against Nick Congemi for two reasons. First, since Plaintiffs' federal claims are premised *by them* upon the *Pickering*[9] balancing test, it is logically *impossible* for them to establish that the violation at issue here qualifies as a violation of a previously existing "clearly established" right in the "particularized" sense required by *Anderson v. Creighton*, 483 U.S. 632 (1986). In this regard, please see *Moran v. State of Washington*, 147 F.3d 839 (9th Cir. 1998) wherein the Ninth Circuit cited cases on this exact point from virtually every circuit in the country, and stated, "We join the chorus of voices from other circuits that have specifically observed the difficulty of finding clearly established law under *Pickering*." *Id.*, at 847[10]

Second, Nick Congemi (the individual) is not the employees' employer. The City of Kenner is their employer. Thus, while they certainly would have a right of action to sue Nick Congemi (the individual) for money damages for acts taken under color of law which they could show violated their *clearly* established constitutional rights, they cannot otherwise obtain relief from him as an individual.

No claim against the City of Kenner under § 1983 has been stated either. In this particular § 1983 action, the policy at issue is not the policy of the municipality, but rather of the state. In

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9. *Pickering v. Board of Education*, 391 U.S. 563 (1968).

10. In addition, the district judge squarely held that qualified immunity applied even if a Constitutional violation had been stated. *West, supra*, 28 F. Supp.2d at 394. This alternative holding has *not* been challenged in the Petition.

Monell, supra, this Honorable Court authorized actions against municipalities for Constitutional violations caused by a policy *of the municipality. See e.g., Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986).

At bar, there is absolutely no *municipal* policy at issue. The only "policy" is that promulgated by the State of Louisiana through it Constitution and statutes. In this regard, please review the following passage from the district court's opinion at bar which has not been assailed in any way by the Petitioners to this Court:

> The Fifth Circuit has long recognized that simply following the mandatory dictates of state law cannot form a predicate for *Monell* liability. This point was explained in *Bigford v. Taylor*, 834 F.2d 1213, 1222 (5th Cir. 1988), when the Fifth Circuit stated that a county official's "deliberate or mistaken departure from controlling law" cannot be said to represent county policy. See also *Bethesda Lutheran Homes and Svcs., Inc. v. Leean*, 154 F.3d 716, 718-719 (7th Cir. 1998) ("but the state of mind of local officials who enforce or comply with state or federal regulations is immaterial to whether the local government is violating the Constitution if the local officials could not act otherwise without violating state or federal law. The spirit, the mindset, the joy or grief of local officials has no consequences for the plaintiffs if these officials have no discretion that they could exercise in the plaintiffs' favor. '[M]unicipal liability under § 1983 attaches where — and only where — a deliberate choice to follow a course of action is made from among various alternatives.' ") (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) (plurality of opinion)) (other citation omitted). *West, supra*, 28 F.Supp.2d at 394-95

In sum as to this contention of the Petitioners, the U.S. Fifth Circuit did exactly what it was supposed to do by looking directly to the Constitutional issue. *Siegert, supra.* However, and in any event, the Petitioners would still have lost against Chief Congemi since he was not *personally* their employer and was entitled to qualified immunity, and, since the City of Kenner could not be successfully sued under 42 U.S.C. § 1983 for doing nothing other than enforcing a Constitutional *state* policy.[11]

7. Injunctive Relief is Not Available

Before the Petitioners respond to the above-stated caselaw on qualified immunity with a supplemental brief that such does not apply to injunctive claims, Respondents submit that injunctive relief is not available in this case as per this Honorable Court's prior precedents.

First, in *Tower v. Glover*, 467 U.S. 914 (1984) this Honorable Court determined that, "A defendant in a civil or administrative enforcement proceeding may not enjoin or sidetrack that proceeding by resorting to a § 1983 action in federal court." *Id.*, at 2826. That is exactly what has been *attempted* at bar. The instant lawsuit was filed in response to Chief Congemi's notification of each of the five employees of the scheduling of a pre-termination hearing. The district judge refused to rule upon the claim for injunctive relief until after Chief Congemi had actually decided whether the employees were to be terminated or not. After Chief Congemi did in fact terminate the employees, the U.S. district judge refused to grant injunctive relief. Thereafter, the matter proceeded (as it should have) before the City of Kenner Municipal Fire and Police Civil Service Board. That body has now ruled *on the merits* that Chief Congemi acted in good faith and for legal cause.[12]

11. Violations of state law cannot form the predicate of liability under 42 U.S.C. §1983. *Elder v. Holloway*, 510 U.S. 510, 515-16 (1994).

12. Despite this fact finding, Petitioners clearly desire that this Court examine the question of Chief Congemi's subjective motivations (Cont'd)

(Attachment 1) At present, a Louisiana state appellate court is reviewing that decision in the light of Louisiana state law. Clearly, the Petitioners' dearest hope is that this Honorable Court will "enjoin and sidetrack" that state proceeding by somehow enjoining Louisiana's application and interpretation of its own laws.

Respondents submit that this Court's prior precedents clearly establish that if the Petitioners at bar cannot show a basis for monetary liability, that they have no other viable claim to present a federal court. In that regard, this Court announced the following rule in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983):

> Absent a sufficient likelihood that he will again be wronged in a similar way, Lyons is no more entitled to an injunction than any other citizen of Los Angeles; and a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional. *Id.*, at 111.

At no time in the instant cause have the Petitioners claimed that they are in danger of being terminated *again*. As such, unless they have presented this Court a claim of monetary liability which can surpass all of the precedent noted above, there is no reason for this federal action to continue further. It should be allowed to run its course in the appellate system of the State of Louisiana, without any further involvement of the federal courts.

8. *Pickering* Balancing Would Not Lead to a Different Outcome

Respondents also respectfully submit that (1) the *Pickering* balancing test is not reached in this matter, and (2) even if it is reached, that application of that test to these circumstances leads to the exact same outcome.

(Cont'd)
as if this Court were a trial court, and, as if the fact findings of the Civil Service Board had never occurred.

First, it is important to note that the Petitioners have conceded the Constitutionality of the Louisiana Rule. They have thus conceded, as they must given *Broadrick* and *Letter Carriers*, that this particular rule is "essential" to the functioning of government. Given these concessions, they have no cause to argue in federal court that application of the rule to them is somehow prohibited as a violation of *their* Constitutional rights, just because they violated the rule in "association" with others. With respect, their argument is illogical.[13] (One does not obtain a magic talisman with which to violate the law merely by violating the law while wearing a union hat.)

Second, even if a *Pickering* balancing test is conducted (which was not actually done within the Petition for Writ of Certiorari), no different outcome would result. The matter at bar is far different from the situations in *Biller* and *Blaylock*. In those actions, the election contest at issue was that of the President and Vice-President of the United States. At bar, we are dealing with active participation by civil service police officers in an election contest for a person who would sit upon the city council of the municipality which they serve. The close connections at bar are obviously very different from those involved in a national Presidential contest.

How likely is it that an individual employee's job might be effected by who becomes the president? In contrast, a city councilman has direct influence over the overall police budget, and can at the very least strongly influence municipal policy vis-a-vis the police department. Clearly, the actions at bar portend the politicalization of the police department, a reality clearly sought to be avoided by the rule at issue.

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13. A permissible construction of the five former employees' argument is that *they* are attempting to assert *PACK's* rights. However, their argument is also that PACK is a separate corporate entity, and this Court has squarely held that persons have no standing to allege the infringement of the Constitutional rights of third parties. *Conn v. Gabert*, 526 U.S. 286, 293 (1999).

Also, if it is permissible for civil service employees to associate in groups to violate the rule collectively, then clearly we will immediately see competing groups of associations actively soliciting the allegiance of different groups of civil service employees. Wherever such an association forms which is anti-administration, another group will form which is pro-administration. While the label "civil service" will remain in place, all of the problems civil service was designed to avoid will have quickly reentered municipal government service.

Accordingly, the *Pickering* balancing at bar involves great weight being given to the fact that (1) the election campaign at bar was for a municipal city council seat rather than for the United States President, and (2) allowing one group of employees to form an association to violate the law to advance their political agenda, clearly requires that all opposing candidates be allowed to be supported by groups of civil service workers doing the exact same thing. If we go down that road, we would do better to simply repeal civil service all together.

All of these competing interests and considerations were reviewed in detail by this Honorable Court in both *Broadrick* and *Letter Carriers*. In light of the passage in *Letter Carriers* which founded all analysis in that matter upon the "judgment of history," it is prayed that this Honorable Court will see that in any balancing of the applicable interests here, the continuing vitality of Louisiana's Little Hatch Act is "essential" to the functioning of its governmental units. *See Letter Carriers, supra*, 413 U.S. at 557.

9. The Board is Not the Board

In proceedings of this matter before the district court and the appellate court, the City of Kenner and its police chief did *not* premise their Motion for Summary Judgment in any way upon the disputed factual issues of (a) whether the organization known as Police Association City of Kenner (PACK) did actually exist as a corporate entity, and, that the five named employees were indeed the Executive Board of PACK. The reason for this

is that Respondents have always contended that it matters not what hat an employee is wearing at the time the law is violated. Based upon *Letter Carriers* and *Wachsman*, "activity by indirection" is nevertheless a violation.

However, in light of this Honorable Court's Rule 15.2, Respondents respectfully apprise the Court that significant factual issues do exist as to whether PACK exists at all. The required annual filing to keep a corporation in existence in Louisiana had not been filed for "PACK" for *many* years. Moreover, the five persons who claim to this Court to be the PACK Executive Board were not elected to those offices. The purported Articles of Incorporation of PACK mandate elections occurring on the 15th of May. However, facts developed during the civil service hearings established conclusively that these five persons decided in the month of February to simply place themselves in the offices, and to not hold any elections whatsoever. Beyond any doubt whatsoever, they are *not* the Executive Board of PACK, even if PACK exists. Also, it has been learned that "PACK" had not had *any* meetings of its membership for several *years* prior to the events at issue in this case. Finally, two of the five Petitioners swore in an unrelated proceeding that PACK is *not* a union.

Again, Respondents note that they did not defend this case in the Courts below based upon a factual dispute over whether PACK exists, or over whether these five persons may properly call themselves the Executive Board of PACK. (That legal dispute was never made "material" to the Rule 56 motion the Defendants presented the district judge.) Respondents find nothing in Louisiana's Constitution or in its statutes that give them any basis for ignoring the direct command of the law when faced with an employee giving as his or her excuse, "*I did it for the Union.*" Regardless of how, or why, or for whom the violation was committed, the fact remains that the employee "*did it.*" As such, and as was held by the district court and by the appellate court, a Louisiana law (which the Petitioners concede is Constitutional) was violated by these employees' conduct.

CONCLUSION

Following the lead of the U.S. Congress, Louisiana enacted Hatch Act legislation in 1944. Following the lead of this Honorable Court in its 1973 holdings in *Broadrick* and *Letter Carriers*, the people of Louisiana decided to keep their Hatch Act restrictions in their Constitution in 1974. Now, one particular special interest group seeks to use the federal court system and the government of the United States to effectively repeal a Louisiana Constitutional provision and statutory article. Respondents, having established that they did nothing other than respect the command of Louisiana's law, as found by the City of Kenner Civil Service Board, a judge of the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana, a U.S. District Judge and by a three judge panel of the U.S. Fifth Circuit Court of Appeals, respectfully ask of this Honorable Court, that the Petition for Writ of Certiorari be DENIED.

Respectfully submitted,

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Attorneys for Respondents

APPENDIX

ATTACHMENT 1 — EXCERPT, CIVIL SERVICE BOARD MEETING, JUNE 24, 1999

CITY OF KENNER

KENNER MUNICIPAL FIRE & POLICE

CIVIL SERVICE BOARD

Civil Service Board Meeting
June 24, 1999
1801 Williams Boulevard
Kenner, Louisiana 70062

* * * * *

EXCERPT

* * * * *

Board Members:

MR. FRANK SIMONCIONI, Chairman
MR. JEROME VOLK, JR.
MR. MICHAEL VOLTOLINA
MR. RONALD J. LABARRIERE
MR. GREGORY GREMILLION, Board Attorney

Representing the Appointing Authority:

MR. PHILIP J. BOUDOUSQUÉ
MR. JERRY NIELSEN

Attachment 1

Representing Officers Jaume, Lynch, Polito, West and Verrette:

MR. KEITH R. CREDO

Reported by: Cindi Jukes and
Certified Court Reporter
State of Louisiana

PROCEEDINGS

MR. SIMONCIONI:

Okay. I'm going to make this motion, finding that the Appointing Authority acted in good faith and for cause in the termination of the five subject police officers in this hearing.

Specifically, we find that the five officers, both indirectly and directly, caused a $300 contribution to the Stagni campaign in violation of LA R.S. 33:2504(3). We further find that the members of PACK were not made aware by the five board members that the contribution had been made at the time of the contribution.

Secondly, we find that the actual political endorsement letter to the Stagni campaign for election signed by these five individuals directly and indirectly violated Louisiana Constitution Article X, Section 9, by supporting the election of a candidate for political office, and violated LA R.S. 33:2504(4)(e) by taking part in the political campaign of a candidate for public office by endorsing the candidate, which

is also a violation of Subsection A.4(d), as said endorsement is a public, political statement of a candidate seeking to be elected to public office.

We further find that the five policemen did not operate the organization as a factional, political club or organization. The Board finds theses violations were not done willfully as set forth in R.S. 33:2507. We find that termination is inappropriate. The penalty should be time lost from the date of termination and throughout the pendency of these proceedings until there is a higher court interpretation of the penalties for a non-willful violation set out in R.S. 33:2504C and 2507.

In addition, there shall be no award of lost seniority or back pay or any other benefits lost or financial reward. It is our finding that the two penalty statutes are ambiguous and in conflict with each other.

I need a second.

MR. VOLK:

I'll second.

MR. SIMONCIONI:

All in favor?

THE BOARD:

Aye.

Attachment 1

MR. SIMONCIONI:

All against?

MR. VOLTOLINA:

Nay.

MR. SIMONCIONI:

I'd like to read the minority opinion. Mike Voltolina voted "nay," and his vote that these five men, policemen, did not willfully violate any of these laws. It further states that the statute itself LA R.S. 33:2501 does not prohibit a union from endorsing a candidate for public office.

MR. GREMILLION:

That's 04.

MR. SIMONCIONI:

Sorry?

MR. GREMILLION:

2504 rather than 01.

MR. SIMONCIONI:

Okay. 2504 does not prohibit a union from endorsing a candidate for public office. These five individuals have

proven they have made every attempt, including seeking and receiving a written attorney's opinion and an oral opinion from another attorney, that the Cannatella decision is controlling law. The penalty is excessive for the circumstances of this case. That's the minority opinion.

MR. VOLK:

Mr. Chairman, I would also like to add my own opinion to the opinion that I previously seconded and the minority opinion. That I will like to add that these cases are factually intensive and the facts are controlling, and that the facts as set out in the Cannatella decision, wherein those facts were jointly stipulated to by all parties.

In this case, the facts were not stipulated to by any of the parties and were in fact hotly contested by all parties involved herein.

MR. GREMILLION:

Is there anything further to Mr. Voltolina's part of the opinion or that's it?

MR. VOLTOLINA:

Pretty much.

MR. GREMILLION:

Y'all need to go ahead and vote on that.

Attachment 1

MR. SIMONCIONI:

We already voted on it.

MR. GREMILLION:

Okay. The only other mention is what I understand that the board members found that the Chief acted in good faith and for cause in the termination. But because the penalty statute is ambiguous between 2504 and 2507, basically finding that the penalty, because it's ambiguous and it wasn't willful, that the termination was improper; is that correct?

MR. SIMONCIONI:

Yes.

MR. CREDO:

Can I ask does that mean that they get their jobs back with no lost time?

MR. VOLK:

No. It's pending the proceedings. We know you guys are taking it up and we don't know — the statute itself is so ambiguous, it doesn't tell you what you can do when there's no willful violation.

MR. SIMONCIONI:

Okay, that's it. Thank you.

(End of proceedings.)

Attachment 1

CERTIFICATE

I, Cindi Jukes, Certified Court Reporter, in and for the State of Louisiana, do hereby certify that the foregoing pages of proceedings were reported by me in stenotype and transcribed by me or under my personal direction and supervision, and are a true and correct transcript, to the best of my ability and understanding;

That I am not of counsel, not related to counsel, nor to the parties hereto, and am in no way interested in the outcome of this event.

/s/ Cindi Jukes
Cindi Jukes, CCR
Certified Court Reporter
State of Louisiana
Certificate No. 91356

ATTACHMENT 2 — JUDGMENT AND REASONS OF THE 24TH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON, STATE OF LOUISIANA, DATED AND FILED FEBRUARY 29, 2000

24TH JUDICIAL DISTRICT COURT FOR THE
PARISH OF JEFFERSON
STATE OF LOUISIANA

NUMBER: 541-272c/w541-993 DIVISION "F"

CITY OF KENNER POLICE DEPARTMENT

VERSUS

KENNER MUNICIPAL FIRE AND POLICE
CIVIL SERVICE BOARD

FILED: FEBRUARY 29, 2000 /s/ Herbert W. Anderson
DEPUTY CLERK

JUDGMENT

This matter came before the Court on an appeal from a ruling from the Kenner Municipal Fire and Police Civil Service Board.

Upon giving due consideration to the law and evidence, and in accordance with the Reasons for Judgment signed this date.

IT IS ORDERED, ADJUDGED, AND DECREED that the decision by the Kenner Municipal Fire and Police Civil Service Board finding the appellants in violation of La.R.S. 33:2504 be affirmed.

Attachment 2

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the decision by the Kenner Municipal Fire and Police Civil Service Board reinstating appellants be reversed.

Judgment read, rendered, and signed this 29th day of February, 2000.

/s/ Patrick J. McCabe
JUDGE

Attachment 2

24TH JUDICIAL DISTRICT COURT FOR THE
PARISH OF JEFFERSON
STATE OF LOUISIANA

NUMBER: 541-272c/w541-993 DIVISION "F"

CITY OF KENNER POLICE DEPARTMENT

VERSUS

KENNER MUNICIPAL FIRE AND POLICE
CIVIL SERVICE BOARD

FILED: FEBRUARY 29, 2000 /s/ Herbert W. Anderson
DEPUTY CLERK

REASONS FOR JUDGMENT

This matter came before the Court on an appeal from a ruling from the Kenner Municipal Fire and Police Civil Service Board.

Five Kenner City Police officers who were members of the Classified Civil Service were terminated for violations of La.R.S. 33:2504 which prohibits political activity by civil service employees. The police officers were also members of the Police Association of Kenner (PACK) and comprised its executive board.

On June 25, 1998 each of the former employees filed a Petitions for Appeal with the Kenner Municipal Fire and Police Civil Service Board. After conducting hearings, the

Attachment 2

Board rendered a decision. The Board concluded that each employee had violated La.R.S. 33:2504 and that Chief Nick Congemi acted in good faith and for legal cause in ordering that they be terminated. However, the Board determined that an ambiguity existed between La.R.S. 33:2504 and 2507 and elected to change the severity of the penalty imposed. Consequently, the Board ordered that the employees be reinstated. From this ruling, both the employees and the City of Kenner as the Appointing Authority appeal.

The appellant police officers who were members of PACK were approached by Joseph Stagni, candidate for Councilman-at-Large for City of Kenner concerning an endorsement. A letter personally signed by the appellants announcing the decision to support Stagni was sent to the PACK membership. Appellants then made the decision that Stagni should receive the endorsement and a $300 financial contribution to his campaign. Subsequently, Chief Nick Congemi conducted a formal investigation for possible violations of La.R.S. 33:2504. As a result of the investigation, Chief Congemi notified each of the officers of a pre-termination hearing on June 4, 1998. Appellants were terminated June 15, 1998.

Appellants then sought an appeal with the Kenner Civil Service Board and injunctive relief in the United States District Court. The federal court denied summary judgment on the civil rights claims finding that the employees had violated the provisions prohibiting political activity. Jurisdiction over pending state law claims was denied.

The Civil Service Board, after conducting hearings, then concluded that the five officers both indirectly and directly

violated statutes prohibiting political activity by civil service employees. Specifically, the Board found that the $300 campaign contribution was a violation of La.R.S. 33:2504(3). In addition, the actual political endorsement was a violation of Louisiana Constitutional Article X, Section 9 and La.R.S. 33:2504(e) by supporting a candidate for public office and participating in the candidate's campaign. The Board also found that termination was inappropriate and ordered the employees reinstated.

The standard of review in civil service cases is whether the action of the board was arbitrary and capricious. Great weight should be given to the factual determination of the board. The board's findings should not be reversed unless clearly wrong or manifestly erroneous. Legal cause exists when there is a factual determination that certain behavior occurred. **Marcantel v. DOTD**, 590 So.2d 1253 (La.App.1st Cir. 1991).

The present case was reviewed by the United States District Court in **West v. Congemi**, 28 F.3d 385 (E.D. La. 1998) and appellants were found to be in violation of the statutes. The court found that the endorsement and campaign contribution amounted to at least indirect political activity and properly fell within the ambits of La.R.S. 33:2504 which prohibits political activity undertaken either directly or indirectly. Therefore, Chief Congemi properly complied with the statute which mandates termination.

Considering the particular facts of the case, the findings made by the federal court on the same set of facts and applying the appropriate standard of review, the Court finds

that the Board's actions were neither arbitrary nor capricious. The Board had legal cause for its findings. Appellants controlled PACK and did in fact violate the provisions of La.R.S. 33:2504. Political activity undertaken either directly or indirectly is specifically proscribed under the statute. The endorsement of Stagni and contribution to his campaign amounted to political activity prohibited by La.R.S. 33:2504. Therefore, the Board's actions in finding a violation of the statute should be upheld.

However, the Court also finds that La.R.S. 33:2504 mandates that the penalty for violation is termination. There is not any conflict between La.R.S. 33:2504 and 33:2507. La.R.S. 33:2504 specifically provides the penalty for violation of the provisions of the statute. The Board's finding is not factual but rather a legal determination and it did not have discretion under the statutes to decide whether a lesser penalty was more appropriate. The language of the statute is mandatory and clearly states "that the appointing authority shall discharge from the service any employee whom he deems guilty of violating any one or more of the provisions of this Section." Therefore the Court concludes that the penalty levied by the Board should be overturned. The appropriate penalty is termination.

SIGNED this 29th day of February, 2000, Gretna, Louisiana.

/s/ Patrick J. McCabe
JUDGE